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Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism”

Hannah L. Buxbaum

Indiana University Maurer School of Law

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Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism”

Hannah L. Buxbaum*

Abstract

One consequence of the increasingly transnational nature of civil litigation is that U.S. courts must frequently address the interests of foreign sovereigns. These interactions arise primarily in three contexts: when a foreign government is the defendant in a U.S. court; when a claim requires a U.S. court to scrutinize actions taken by a foreign government; and when a U.S. court seeks to apply U.S. law to persons or conduct within a foreign government’s borders. Each of these contexts invokes a narrative in which the engagement of U.S. courts interferes or conflicts with the prerogatives of a foreign sovereign. As a result, we typically consider the foreign relations implications of domestic adjudication within a paradigm that is oriented toward constraining the engagement of U.S. courts in matters involving foreign sovereign interests. What this approach ignores, however, is that foreign sovereigns are also plaintiffs in U.S. courts. A full account of the interactions between U.S. courts and foreign sovereigns must address cases in which foreign governments actively seek to engage U.S. judicial resources.

This Article sets out the first systematic analysis of claims filed in U.S. domestic courts by foreign sovereigns, drawing on an

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examination of almost 300 claims. It establishes a basic typology of such claims, and then uses three case studies to explore and challenge the paradigm outlined above. The final section of the article relies on the results of this examination to analyze developments in one particular context: the extraterritorial application of U.S. law. It argues that the narrative of “judicial imperialism” that has come to frame discussion in that area is neither accurate nor useful.

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I. Introduction

Civil litigation in the United States has become increasingly transnational, and U.S. courts routinely consider claims that involve foreign parties, significant foreign elements, or both. One particular aspect of this transnationalization is that domestic courts must frequently address the interests of foreign sovereigns. Foreign governments are sometimes parties to litigation in U.S. courts; in addition, they often participate as *amici curiae* in litigation involving their citizens (including corporations formed under their laws). These interactions create a range of implications for U.S. foreign relations.

Interactions between U.S. domestic courts and foreign sovereigns arise primarily in three contexts: (1) when a foreign government is the defendant in a U.S. court, raising the issue of sovereign immunity;¹ (2) when a claim requires a U.S. court to scrutinize actions taken by a foreign government within its own borders, raising the act of state issue;² and (3) when a U.S. court seeks to apply U.S. law to persons or conduct within a foreign government's borders, raising the issue of extraterritoriality.³

1. The scope and limits of sovereign immunity are set forth in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2012).

2. See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (discussing the act of state doctrine and its rationale).

3. For a comprehensive introduction, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–87 (1998) (tracing the jurisprudence of the presumption from *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), to *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)). The Supreme Court's most recent jurisprudence on the extraterritorial application of U.S. law is discussed *infra* Part IV.C.

Each of these contexts invokes a narrative in which the involvement of U.S. courts creates conflict—or potential conflict—with the interests of foreign governments, which in turn seek to fend off the intervention of U.S. courts to preserve their own sovereign autonomy. The paradigm within which we consider the foreign relations implications of domestic adjudication is in this sense oriented toward constraining the engagement of U.S. courts in matters involving foreign sovereign interests.

But what about situations in which foreign governments actively seek the engagement of U.S. courts? They often do—because they are not only defendants in our courts, but also plaintiffs. When foreign sovereigns initiate lawsuits in U.S. courts, they *choose* to engage with our judicial system, and to deploy the resources of that system to attain certain objectives. An examination of such lawsuits can therefore yield a fuller account of the interactions between foreign governments and U.S. courts, permitting us to test the adequacy of the prevailing paradigm and consider its normative implications.

This Article sets out the first systematic analysis of claims filed in U.S. domestic courts by foreign governments, drawing on an examination of almost 300 claims lodged by foreign sovereigns in U.S. courts.⁴ Part II begins with a brief review of the standing of foreign sovereigns to sue in U.S. courts. It then establishes a typology of claims initiated by foreign governments, ranging from ordinary commercial claims to claims arising from alleged treaty violations by the United States. Part III focuses on one subset of these claims, using a series of case studies to investigate more closely the foreign policy implications of U.S. judicial engagement in matters involving foreign sovereigns. It analyzes those claims from the perspective of both the plaintiffs (examining their arguments for initiating litigation in the United States) and the courts (examining the analysis they deploy to assess various jurisdictional limits). This analysis complicates the traditional account of these implications in several important ways. First, it reveals regional differences in the motivation of governments to file certain types of claims, suggesting that further differentiation is required in analyzing the impact of U.S. judicial intervention

4. See *infra* notes 46–47 and accompanying text (describing the methodology used in assembling this data set).

on foreign interests. Second, it undermines some of the arguments that foreign governments make as *amici curiae* when they object to the assertion of U.S. jurisdiction in cases involving their citizens. Third, and most broadly, it challenges the characterization of judicial intervention as unwelcome unilateralism—a characterization that shapes much of the discussion regarding U.S. judicial engagement in international matters.

Part IV uses the results of this examination to analyze developments in one particular context: the extraterritorial application of U.S. law. In a series of recent decisions, the Supreme Court has restricted both the extraterritorial application of domestic regulatory law⁵ and the scope of jurisdiction under the Alien Tort Statute⁶—changes that were intended to and will limit the role of U.S. courts in adjudicating transnational disputes. This retrenchment reflects the ascendance of one particular narrative focused on the foreign policy implications of transnational litigation: a narrative in which the engagement of U.S. courts in the global arena constitutes interference with the sovereign authority of other countries. At its center is the argument that U.S. courts undermine the regulatory authority of other nations when they overreach by (a) taking jurisdiction over claims that are more closely connected to other countries and presumably should be litigated there, and (b) too readily applying U.S. law to claims with significant foreign elements. The narrative is not entirely new: Its basic contours can be traced in past episodes of judicial engagement in the transnational arena, such as the international antitrust disputes of the 1970s.⁷ Its dominance today, however, is

5. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 278 (2010) (applying the presumption against extraterritoriality to securities law); *F. Hoffmann–LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004) (interpreting domestic antitrust law to exclude foreign activity causing foreign harm).

6. 28 U.S.C. § 1350 (2012); see *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that the Alien Tort Statute was not meant to have extraterritorial reach).

7. For a discussion of this litigation and the resulting conflict between the United States and other countries, see ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW* 157–66 (1996) (analyzing the interplay between U.S. and

new. In addition, it has become far more pointed, often finding expression in cases and commentary as “judicial imperialism.”

Litigants routinely invoke this narrative in contesting the exercise of legislative jurisdiction by U.S. courts.⁸ Foreign governments use it to frame their complaints about the perceived overreaching of U.S. courts, arguing the need for judicial restraint in various contexts.⁹ It has become prominent in legal scholarship, as commentators invoke it to support normative arguments regarding the role of domestic courts in transnational disputes. Most consequentially, U.S. courts, including the Supreme Court, have increasingly cited concerns regarding interference with foreign sovereignty as a primary rationale for limiting legislative jurisdiction over transnational claims. The rhetoric of imperialism is in this way translating into a reduced role for U.S. courts in addressing transnational regulatory cases—a change that will have significant impact on overall enforcement capacity.

Judicial imperialism is a powerful and effective narrative for the reasons explored below. The analysis of claims initiated by foreign sovereigns, however, suggests that the concept fails to capture the full range of interactions between foreign governments and U.S. courts. Many of these interactions indicate the possibility that U.S. judicial engagement creates conditions not only of conflict but also of coordination within the system of global governance. The Article concludes that the imperialism narrative is neither accurate nor useful; it impedes doctrinal development in the area of extraterritoriality, and misdirects institutional design choices in global governance.

British courts in litigation involving a uranium cartel).

8. *Infra* Part IV.

9. In one of the Alien Tort Statute cases that reached the U.S. Supreme Court, for instance, the European Commission filed an amicus brief stating:

[I]n order to respect the authority of States and organizations, like the European Community, exercising their authority to regulate activities occurring on their own territory, and hence to preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.

Brief of the European Commission as Amicus Curiae in Support of Neither Party at 2, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036.

II. Foreign Governments as Plaintiffs in U.S. Courts

As noted above, the interactions between U.S. courts and foreign governments are typically considered in connection with cases in which those governments resist the involvement of the U.S. judiciary in cases that implicate their interests.¹⁰ However, this paradigm, in which foreign governments adopt a defensive posture regarding U.S. judicial involvement, does not capture the full range of those interactions. For instance, sometimes foreign governments waive their immunity to suit in U.S. court.¹¹ Sometimes they express support for the adjudication in the United States of claims involving their citizens or their own interests.¹² And sometimes, of course, they are plaintiffs in U.S. courts. In these cases, they take affirmative action to initiate the involvement of U.S. courts in resolving transnational disputes. Although such claims constitute a small percentage of all litigation involving foreign sovereign parties, they provide a critical counterpoint to the prevailing paradigm. A full account of the foreign relations issues arising from judicial engagement in the transnational arena must therefore consider such litigation.

This Part analyzes the results of research on claims initiated in U.S. domestic courts by foreign governments. It begins with an overview of the law governing the standing of foreign governments to sue in U.S. courts, and then establishes a typology of the lawsuits they initiate.

10. *Supra* notes 1–3 and accompanying text.

11. *See* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014) (“A foreign state may waive jurisdictional immunity, § 1605(a)(1), and in this case Argentina did so.”).

12. One mechanism that some countries have employed to steer litigation involving their citizens towards U.S. courts is the “anti-forum non conveniens” statute. These laws are designed to close local courts to claims that were dismissed by a foreign court on the basis of forum non conveniens, thus eliminating the possibility of an adequate alternative forum. *See generally* Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. INT’L L. & POL. 1003, 1017–21 (2013).

A. *The Standing of Foreign Governments to Sue in U.S. Courts*

As the Supreme Court has long confirmed, foreign governments have standing to bring suit in U.S. courts.¹³ The source of their standing is the general principle of comity—that is, the goodwill and respect that sovereign states afford one another.¹⁴ As a result, their standing is viewed as a privilege, not as a right, and is limited to “recognized” foreign governments not at war with the United States.¹⁵ The authority to recognize a foreign government rests solely with the executive; thus, once a government has officially been recognized, the courts must afford it standing to sue.¹⁶

In a number of cases, U.S. courts have confronted claims brought by governments in the midst of diplomatic unrest with the United States—including some brought by governments with which the U.S. had broken off diplomatic relations entirely.¹⁷ As some commentators have argued, if comity is the source of their standing, then it would be more appropriate for courts to inspect not just the past act of the executive in recognizing a government, but the current policies and activities of that government.¹⁸ On

13. In *Pfizer, Inc. v. Government of India*, the Supreme Court confirmed the rule “that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do.” 434 U.S. 308, 318–19 (1978).

14. Early cases speak of “comity and friendly feeling” among sovereigns as the basis for according this privilege. See *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1881) (“A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling.”); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (explaining that this entitlement is a privilege resulting from comity).

15. See *Pfizer*, 434 U.S. at 319–20 (“It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts . . .”).

16. See generally Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 523–24 (1987) (describing the “absolute deference” accorded to the executive in making this determination).

17. See *Republic of Cuba v. Mayan Lines, S.A.*, 145 So. 2d 679, 682 (La. Ct. App. 1962) (allowing Cuba to bring a suit in United States courts despite “the complete severance of [a] relationship between the Government of the United States and the Government of Cuba”).

18. See J. Gordon Hansen, *Current Problems Regarding the Standing of Foreign Governments to Sue in American Courts*, 112 U. PA. L. REV. 417, 419 (1964) (arguing that “recognition of a government by the United States at some

such a view, a disruption in diplomatic relations would eliminate the need to afford the relevant government courtesy and goodwill, and would therefore strip it of its standing to sue in U.S. courts.¹⁹ The cases, however, have been uniform in concluding that it is formal recognition alone that is the predicate to standing.²⁰ In one case, for instance, a Louisiana court held that recognition continues until “expressly withdrawn . . . by the appropriate political department” and that the court would therefore not consider the fact of diplomatic unrest (in that case, with Cuba).²¹ The Supreme Court ratified this view in *Banco Nacional de Cuba v. Sabbatino*.²²

As the *Pfizer* case cited above states, foreign governments have the right to sue “upon the same basis as a domestic corporation or individual.”²³ As a result, their claims must meet all of the generally applicable requirements for standing in U.S. courts. Under the prevailing framework for standing in federal courts, this means that foreign government plaintiffs must allege: (1) injury in fact (actual harm to a legally protected interest), (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.²⁴ Additionally, they must ensure that their

past time does not show present comity between the two nations”).

19. See *id.* at 432 (“Therefore, if lack of recognition indicates a lack of comity, a severance of diplomatic relations indicates this same condition, and the same result should ensue.”).

20. See, e.g., *Nat’l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988) (explaining that disruption in diplomatic relations with Iran did not impair standing of that government to sue in U.S. federal courts).

21. *Republic of Cuba*, 145 So. 2d at 683.

22. See 376 U.S. 398, 410 (1964):

This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts.

23. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 308 (1978).

24. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (setting forth the test for standing in federal court). The federal judicial power extends to “all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. art. III, § 2, cl. 1. Under the statute governing diversity jurisdiction, the federal courts have jurisdiction over claims between foreign sovereigns and entities within the United States. 28 U.S.C. § 1332(a)(4) (2012).

claims do not run afoul of one of the judicially created limitations on standing, such as the prohibition on third-party standing.²⁵ As these criteria suggest, the standing requirements are most likely to be satisfied when the foreign government asserts harm to an ordinary proprietary interest of some kind (for instance, in a breach of contract action against a U.S. supplier), or to its own sovereign interest. They are less likely to be satisfied when the government, in one way or another, asserts an interest on behalf of individual citizens or its populace as a whole.

Indeed, the most significant issue that has arisen in this context is whether foreign governments enjoy *parens patriae* standing, an exception to normal standing requirements that permits certain governments to bring suit on behalf of their citizens. This exception developed in the common law over the course of the twentieth century, primarily in the context of one state suing another to enjoin activity that was harming the former's citizens. In one leading case, Missouri sued to enjoin Illinois from dumping sewage into interstate waters; the Supreme Court held that a state had standing to sue to protect "the health and comfort of [its] inhabitants," even where it did not assert harm to an independent interest of its own.²⁶ In certain substantive areas, the authority to initiate claims protecting these sorts of "quasi-sovereign" interests was incorporated into statutory law. Under the Clayton Act, for instance, state attorneys general are empowered to bring suit under antitrust laws in the interest of their citizens;²⁷ similarly, many states

25. *Lujan*, 504 U.S. at 560–61.

26. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Cases of this sort also articulated a clear limitation: states were not permitted to sue as simply "nominal" parties where in fact the action was initiated for the benefit of particular individuals. *See, e.g.*, *Pennsylvania v. New Jersey*, 426 U.S. 660, 665–66 (1976) ("[A] state has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens . . ."). In certain circumstances, however, government officials (such as consular officials) have been permitted to bring suit on behalf of individual citizens—for instance, in prize cases, or cases in which an individual sought restitution of particular property located within the United States.

27. *See* 15 U.S.C. § 15(c) (2012) (providing in part that "any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by such natural

have enacted consumer protection statutes that expressly confer *parens patriae* authority on their attorneys general.²⁸

In 1982, the Supreme Court revisited the *parens patriae* jurisprudence and issued a decision that has become the leading modern articulation of the doctrine. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*²⁹ involved claims that a number of Virginia companies had discriminated against temporary workers from Puerto Rico.³⁰ The Court summarized the doctrine as follows:

In order to maintain [a *parens patriae*] action, the State must . . . express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.³¹

Snapp of course involved the rights of U.S. state governments,³² and it is in that context that the second category

persons”).

28. See, e.g., WASH. REV. CODE § 19-86-080 (West 2015) (“The attorney general may bring an action . . . as *parens patriae* on behalf of persons residing in the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful . . .”).

29. 458 U.S. 592 (1982).

30. See *id.* at 597–98 (“[T]he complaint alleged that the defendants had violated . . . federal regulations . . . by failing to provide employment for qualified Puerto Rican migrant farmworkers, by [providing] working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating [their] employment . . .”).

31. *Id.* at 608. The Court also classified various forms of interests that fell *outside* the parameters of the doctrine, including “proprietary” interests and interests pursued by the state as a merely nominal party on behalf of a real party in interest. *Id.* at 601; see also Richard P. Leyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863–69 (2000) (discussing the scope of interests protected by the *parens patriae* doctrine).

32. As a Commonwealth of the United States, Puerto Rico was subject to the same treatment as a state. See *Snapp*, 458 U.S. at 608 n.15 (“Although we have spoken throughout of a ‘State’s’ standing as *parens patriae*, we agree . . . that the Commonwealth of Puerto Rico is similarly situated to a

of interests it identifies is relevant. As previous cases emphasized, part of the logic for permitting states to sue on behalf of their citizens is that they have forfeited other avenues of redress by becoming part of a federal system. In *Missouri v. Illinois*,³³ the Court stated:

If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy³⁴

Foreign governments, in contrast, retain the ability to assert their interests via diplomatic channels and, ultimately, by waging war.³⁵ The “federalism” justification for *parens patriae* standing therefore does not apply to them. The *Snapp* decision, however, appears to present the two categories of quasi-sovereign interests as alternative bases for standing, in which case foreign governments might enjoy the right to bring claims in a *parens patriae* capacity on the other basis—to defend the health or economic interests of their citizens.³⁶

Although the Supreme Court has not directly addressed the question of *parens patriae* suits by foreign governments, a number of lower federal courts have. In the leading case on the issue, *Estado Unidos Mexicanos v. DeCoster*,³⁷ the U.S. Court of Appeals for the First Circuit declined to extend that doctrine to foreign governments.³⁸ That case involved a claim by Mexico that a Maine egg producer had violated the civil rights of workers of Mexican descent (many of whom were Mexican citizens).³⁹ Mexico

State It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.”).

33. 180 U.S. 208 (1901).

34. *Id.* at 241.

35. *Cf., e.g.,* *Gilbert v. Minnesota*, 254 U.S. 325, 328–29 (1920) (“Undoubtedly, the United States can declare war and it, not the states, has the power to raise and maintain armies.”).

36. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

37. 229 F.3d 332 (1st Cir. 2000).

38. *Id.* at 339.

39. *Id.* at 334.

therefore relied on the first of the two *Snapp* categories.⁴⁰ However, the court situated the entire analysis within the context of the federalism question, stating that “such interests are a critical element of *parens patriae* standing.”⁴¹ It conceded that “*Snapp*’s discussion of federalism principles . . . seems to refer distinctly to the second of the two grounds of standing,”⁴² but concluded nevertheless that the “primary justification” for recognizing *parens patriae* standing in U.S. states “derives from important principles underlying our federal system.”⁴³ Noting that “[b]y definition, a foreign nation has no cognizable interests in our system of federalism,”⁴⁴ it held that foreign governments did not enjoy this form of standing in U.S. courts. The court recognized as an exception the circumstance in which either the Supreme Court or the political branches had indicated a clear intent to permit such standing.⁴⁵

B. Typology of Claims Initiated by Foreign Governments

This Part turns to an investigation of the lawsuits that foreign governments file in U.S. courts. It explores the wide variety of contexts for such litigation, ranging from ordinary commercial activity to allegations of treaty violations by the U.S. government. It also reveals significant regional differences in the arguments that foreign sovereigns make when seeking U.S. judicial intervention. The goal of this examination is to provide a rich context within which to consider the transnational engagement of domestic courts, and to explore whether a counter-narrative emerges to the vision of U.S. judicial activity as

40. *See id.* at 336 (discussing the *Snapp* court’s reasoning).

41. *Id.* at 339.

42. *Id.*

43. *See id.* at 337 (“First, the States have surrendered certain aspects of their sovereignty to the federal government and, in return, are given recourse to solve their problems with other States. . . . Second, States require a sufficiently independent forum to resolve their disputes with one another.”).

44. *Id.* at 339.

45. *See id.* at 336 (“Our answer is that *parens patriae* standing should not be recognized in a foreign nation unless there is a clear indication of intent to grant such standing expressed by the Supreme Court or by the two coordinate branches of government.”).

interfering or conflicting with the prerogatives of foreign sovereigns.

In conducting this study, I assembled as full a set as possible of claims brought by foreign governments. They are drawn from Westlaw's "cases" and "trial court documents" databases, in order to identify complaints as well as cases in which a decision was issued.⁴⁶ Because these data are necessarily incomplete,⁴⁷ the Article's objective is not to make quantitative claims or draw statistical inferences, but rather to analyze the results as a cross-section of litigation initiated in U.S. courts by foreign sovereign plaintiffs. While it examines judicial decisions relating to these claims, the study's primary goal is to analyze the complaints themselves. It takes a functional approach, asking what foreign governments seek when they sue in U.S. courts and what different laws and procedures they wish to access.

Lawsuits by foreign governments fall principally into the following broad categories:

1. Claims related to assets located within the territory of the United States;
2. Requests for assistance in connection with foreign judicial or arbitral proceedings;
3. Claims for monetary relief in connection with commercial activity in the United States or involving U.S. counterparties;
4. Claims for injunctive relief following alleged treaty violations by a U.S. municipality or state, or by the federal government; and

46. For each country recognized as a sovereign government by the United States, I searched for instances in which the name of the country (including the names of predecessor states) appeared in the caption of a case or complaint. I then reviewed the results to ascertain whether the claim in question had been initiated by the foreign government.

47. For example, Westlaw includes only reported decisions and non-reported decisions that particular courts choose to submit for inclusion. *See, e.g.*, David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1209 n.24 (2013) (citing studies demonstrating that a data set drawn from that source is not necessarily representative of all disputes).

5. Claims for monetary relief for damages suffered in connection with unlawful conduct occurring within the foreign state.⁴⁸

This Part analyzes each of these categories, providing illustrative examples of claims and assessing the U.S. judicial response to them.

1. Claims Related to Assets Located Within the United States

In these cases, the logic for initiating litigation in a U.S. court is clear: The U.S. court will have the ability to enforce a successful judgment against the relevant assets. Many of them are routine types of claims that raise no significant foreign affairs problems; some, however, particularly those initiated following a regime change, can raise foreign policy concerns. The routine lawsuits within this category include maritime claims in which foreign governments seek to recover a vessel located in U.S. waters or damages for cargo losses occurring within U.S. territory.⁴⁹ They also include claims to enforce judgments or arbitral awards rendered in other jurisdictions,⁵⁰ as well as claims made against the bankruptcy estate of a U.S. debtor.⁵¹

48. For a typology of foreign-state claims asserted within Anglo-Commonwealth legal systems, focusing more on substantive fields of law, see CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* 434 (2015).

49. Many of the older cases in the data set fall into this category. Of the claims initiated by major seafaring nations, for instance, a significant number (including five claims initiated by Portugal in the 1820s, for example) sought to recover either cargo or a vessel located within the United States. *The Gran Para*, 20 U.S. 471 (1822); *The Fanny*, 22 U.S. 658 (1824); *Chace v. Vasquez*, 24 U.S. 429 (1826).

50. In these cases, the foreign government plaintiff is in the position of a judgment creditor seeking to enforce that judgment against U.S. assets of the defendant. *See, e.g.*, *Att’y Gen. of Barb. v. Fitzpatrick Const. Ltd.*, No. 87–4714, 1988 WL 18871, at *1 (S.D.N.Y. Feb. 22, 1988) (seeking to enforce a judgment of the High Court of Barbados); *Ministry of Def. of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1358 (9th Cir. 1989) (seeking to enforce an arbitration award of the Iran–United States Claims Tribunal).

51. *In re Patterson–MacDonald Shipbuilding Co.*, 293 F. 192, 193 (9th Cir. 1923) (“The question presented by the record before us is this: If a foreign government presents a claim to a trustee in bankruptcy arising out of contract and prays for its liquidation . . . may the court of bankruptcy render judgment against the foreign government for the ascertained balance?”); *In re Dinter*, Ch.

Several lawsuits within this category involve cultural heritage claims. In one case, Germany brought a claim against a U.S. citizen to recover two Duerer paintings allegedly stolen during the occupation of Weimar and ultimately acquired by the defendant.⁵² Other such cases include claims by Croatia, Hungary, and Lebanon to recover a collection of Roman silver pieces held for auction by Sotheby's in New York;⁵³ a claim by the Philippines to recover a Picasso painting allegedly stolen from the government's New York office;⁵⁴ claims by two successive governments of Romania to recover artwork located in New York;⁵⁵ a claim by Turkey to recover artifacts in the possession of the Metropolitan Museum of Art;⁵⁶ and a complaint brought by Peru against Yale University seeking the return of stolen antiquities, as well as compensatory and punitive damages.⁵⁷

Many of the cases in this category arise following, and often due to, changes in political regimes. Some seek the return of specific assets that were allegedly improperly converted by former heads of government and, at the time of litigation, were located in the United States. Haiti, for example, filed a lawsuit

7 Case No. 93-3823, Adv. No. 92-1426, 1993 WL 484201, at *6 (D. N.J. Nov. 19, 1993) (discussing what claim Germany would have to the assets of a former citizen of Germany who had moved to New York and declared bankruptcy).

52. Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 752-53 (E.D.N.Y. 1970).

53. See Republic of Lebanon v. Sotheby's, 167 A.D.2d 142, 142-44 (N.Y. App. Div. 1990) (examining two competing claims of ownership for the "Sevso Treasure"); Republic of Croatia v. Tr. of the Marquess of Northampton 1987 Settlement, 203 A.D.2d 167, 167-68 (N.Y. App. Div. 1994) (discussing claims against the same "Sevso Treasure," this time between Croatia and Hungary).

54. Republic of the Philippines v. Christie's, No. 98-3871, 2000 WL 1056300, at *2 (S.D.N.Y. Aug. 1, 2000).

55. See State of Romania v. Former King Michael, 212 A.D.2d 422, 423 (N.Y. App. Div. 1995) (dismissing Romania's suit to reclaim "its artistic patrimony, which has allegedly been scattered throughout Europe and, for our purposes, New York" because the issue was already being litigated in European courts); Socialist Republic of Romania v. Wildenstein & Co., 147 F.R.D. 62, 63-66 (S.D.N.Y. 1993) (involving a claim relating to the same artwork initiated by a predecessor regime).

56. Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44, 46-47 (S.D.N.Y. 1990).

57. See First Amended Complaint ¶ 2, Republic of Peru v. Yale Univ., No. 09CV01332, 2009 WL 6928272 (D. Conn. Apr. 20, 2009) (alleging that Yale breached a contract with Peru by not returning certain artifacts).

seeking damages for conversion, alleging that a particular yacht had been purchased with funds improperly diverted from the Haitian treasury by former president Jean-Claude Duvalier.⁵⁸ In a similar case, the Republic of the Philippines sought an injunction barring its former president Ferdinand Marcos, and a number of others, from alienating their interests in certain property in the state of New York alleged to have been purchased with public funds.⁵⁹ Where these claims relate not merely to assets located within the forum but to the disposition of assets located outside the United States—or seek broader monetary relief from former government officials—they raise more complicated questions, addressed below.⁶⁰

Another set of claims following regime changes seek injunctions that would prevent U.S. financial institutions from transferring funds at the direction of an ousted official. For instance, during the conflict in Panama between the Delvalle and Noriega regimes, a number of claims were initiated by the Delvalle government seeking to enjoin U.S. banks from transferring assets at the direction of certain agencies or instrumentalities within that country.⁶¹ Similarly, following the relocation of the National Government of the Republic of China to Taipei in 1949, litigation ensued when the newly formed People's Republic of China sought to block the National Government's access to bank accounts in the United States.⁶² As noted above,

58. See *Republic of Haiti v. Crown Charters, Inc.*, 667 F. Supp. 839, 844 (S.D. Fla. 1987) (explaining that Haiti sought damages on three grounds: breach of fiduciary duty to plaintiff, breach of fiduciary duty to Haiti, and “imposition of a constructive trust”); see also *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 380–81 (N.Y. App. Div. 1995) (seeking to recover funds allegedly embezzled by Michele Duvalier and her husband and deposited into a particular account in a New York bank).

59. See *Republic of the Philippines v. Marcos*, 806 F.2d 344, 348 (2d Cir. 1986) (discussing the fact that “five properties in New York were allegedly purchased for the benefit of the Marcoses from the proceeds of moneys and assets stolen as stated above from the Philippine government”).

60. *Infra* Part III.A.3.

61. See, e.g., *Republic of Panama v. Republic Nat'l Bank*, 681 F. Supp. 1066, 1068–69 (S.D.N.Y. 1988) (discussing Panama's motion to enjoin funds held in U.S. banks); *Republic of Panama v. Citizens & S. Int'l Bank*, 682 F. Supp. 1544, 1552 (S.D. Fla. 1988) (entering “a preliminary injunction against the defendants from making any debit, . . . against any account of the Republic of Panama, as well as any agency or instrumentality thereof”).

62. See, e.g., *Republic of China v. Am. Express Co.*, 195 F.2d 230, 231–32

only a foreign government recognized by the U.S. executive has standing to sue in U.S. courts.⁶³ In cases like these, the foreign affairs concern is simply identifying which of two competing claimants has the right to formal recognition.⁶⁴

2. Requests for Judicial Assistance

Of the set of claims examined, 20% fall into this category. In most of the cases in this group, foreign governments simply avail themselves of the rights they possess under bilateral treaties with the United States. These include extradition treaties⁶⁵ and treaties providing for mutual legal assistance in civil or criminal matters.⁶⁶ Claims in the latter category include requests for various forms of assistance, including the deposition of witnesses located in the United States⁶⁷ and the provision of blood or DNA testing in connection with paternity disputes.⁶⁸ Additional claims for judicial assistance arise not under treaties but pursuant to 28

(2d Cir. 1952) (examining a claim by the Republic of China that American Express refused to hand over money deposited by China).

63. *Supra* note 5 and accompanying text.

64. For an example of the complications that can result, see *Government of Rwanda v. Johnson*, 409 F.3d 368, 376–77 (D.C. Cir. 2005) (addressing claims brought against a former ambassador alleging conversion and breach of fiduciary duty).

65. Twenty-seven of the claims analyzed were requests for extradition. In such cases, the U.S. court simply reviews the request to ensure that the procedural requirements established in the relevant treaty have been met. *See, e.g., Republic of France v. Moghadam*, 617 F. Supp. 777, 778 (N.D. Cal. 1985) (denying a request on the ground that France had failed to establish either the existence of probable cause or the principle of dual criminality, two requirements under the treaty between France and the United States).

66. Thirty-four claims were for assistance in civil or criminal matters pending in the requesting country. In such cases, again, the U.S. court reviews the request to ensure that it meets the conditions for assistance established in the relevant treaty.

67. *See, e.g., In re Request from Swiss Fed. Dept. of Justice & Police*, 731 F. Supp. 490, 490–91 (S.D. Fla. 1990) (discussing a request from the Swiss under the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters).

68. *See, e.g., In re Letter of Request from Dist. Court Stara Lubovna*, No. 3:09-mc-20-34, 2009 WL 3711924, at *3 (M.D. Fla. Nov. 4, 2009) (allowing the United States to collect DNA-based evidence on a request from the Slovak Republic).

U.S.C. § 1782, a provision that enables U.S. courts to render judicial assistance to foreign authorities in connection with proceedings underway in foreign tribunals.⁶⁹ Foreign governments have sought assistance under this provision in connection with both litigation and arbitration occurring elsewhere, although the latter claims have been unsuccessful.⁷⁰

Finally, foreign governments sometimes seek various forms of non-monetary relief in connection with ongoing proceedings in other fora. For example, governments have sought to vacate or modify arbitral awards rendered against them,⁷¹ to stay arbitration,⁷² and to set aside judgments.⁷³

3. Claims for Monetary Relief in Connection with U.S.-Based Commercial Activity

Foreign governments often participate in various forms of commercial activity that is based in the United States or involves U.S. counterparties. When they suffer losses as a result of such activity, they may sue in U.S. courts to recover monetary damages.⁷⁴ Many of the cases in this category are relatively

69. 28 U.S.C. § 1782 (2012). The section provides in part that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.” *Id.* § 1782(a). For a general overview of the scope of the provision, see *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–49 (2004).

70. *See, e.g., Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (declining to provide assistance and holding that § 1782 was not intended to apply to private international arbitration).

71. *See, e.g., Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1365 (D.C. Cir. 2012), *rev’d by BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014) (seeking to vacate or modify arbitral award rendered pursuant to a bilateral investment treaty); *Republic of Colombia v. Cauca Co.*, 106 F. 337, 338 (D. W. Va. 1901), *rev’d*, 190 U.S. 524, 525 (1903) (seeking to cancel an award made pursuant to agreement to arbitrate).

72. *See, e.g., Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (petitioning a stay of arbitration on the grounds that Ecuador never agreed to arbitrate).

73. *See, e.g., Republic of Cuba v. Mayan Lines, S.A.*, 145 So.2d 679, 689 (La. Ct. App. 1962) (seeking to set aside a judgment based on alleged fraud, error, and “ill practice”).

74. In the reverse situation—when the counterparty has suffered losses—the foreign governments may be sued in U.S. courts under the relevant

straightforward breach of contract claims,⁷⁵ although some involve claims under tort law⁷⁶ or various types of regulatory law.⁷⁷

Under the doctrines discussed above, it is clear that foreign governments have standing to initiate this kind of suit in order to vindicate their own proprietary interests.⁷⁸ However, these claims can sometimes raise complicated doctrinal questions regarding the intersection between the standing of foreign governments as plaintiffs and their immunity as defendants. These questions arise when a foreign government sues a defendant who subsequently raises a counterclaim. If the counterclaim is related directly to the original claim, then the act of initiating litigation is viewed as a waiver of immunity with respect to the counterclaim.⁷⁹ If not, however, then the immunity

provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, 1604 (2012).

75. *See, e.g.*, *Belize v. Howtzer Corp.*, 144 F. App'x 849, 849 (11th Cir. 2005) (concerning a breach of contract claim for the purchase of prefabricated homes); *Government of the Republic of China v. Compass Commc'ns Corp.*, 473 F. Supp. 1306, 1308–09 (D.D.C. 1979) (concerning a breach of contract claim for the purchase of electronics); *Democratic Republic of the Congo v. Air Capital Group, LLC*, No. 12–20607–CIV, 2013 WL 3223686, at *9 (S.D. Fla. June 24, 2013) (concerning a breach of service contract for aircraft maintenance); *Government of the Republic of South Africa v. Sonsino*, No. 10 Civ. 6554 (NRB), 2011 WL 4357381, at *1–2 (S.D.N.Y. Sept. 16, 2011) (concerning the breach of a residential lease agreement).

76. *See, e.g.*, *Australia v. Lockheed Aircraft Corp.*, No. 69–1623, 1972 WL 232615, at *9 (C.D. Cal. Jan. 11, 1972) (concerning a product liability claim against the manufacturer of aircraft purchased by the plaintiff); *Republic of France v. Lehigh Valley R.R. Co.*, 96 N.J.L. 25, 26–28 (N.J. 1921) (concerning a negligence claim against the railroad for damage to goods).

77. In one case, for instance, several governments brought claims against a New York textile company under the Lanham Act, alleging that the defendant's use of a particular trademark interfered with their intellectual property rights. *W. Indian Sea Island Cotton Ass'n v. Threadtex, Inc.*, 761 F. Supp. 1041, 1043–47 (S.D.N.Y. 2004); *see also* *Libya v. Miski*, 889 F. Supp. 2d 144, 147–48 (D.D.C. 2012) (involving a claim by Libya under trademark law and the AntiCybersquatting Consumer Protection Act related to its own business operations in the United States); Complaint ¶¶ 13–15, *Republic of Colombia v. Unicof, USA*, No. 01-31-A, 2001 WL 36081532 (E.D. Va. Jan. 9, 2001) (discussing claims filed by Colombia alleging trademark infringement by a U.S. coffee company).

78. *See supra* Part II.A (discussing the law governing standing of foreign governments).

79. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1607(b) (2012).

continues. Additionally, some courts have recognized a right of set-off.⁸⁰

4. *Claims for Injunctive Relief Following Alleged Treaty Violations*

Litigation of this kind is relatively rare. Some of the claims in this category are routine, involving issues such as efforts by municipalities to tax premises used by foreign consulates for governmental purposes.⁸¹ Others, however, can raise significant foreign relations concerns.⁸² In 2015, for example, a federal district court in California considered a claim brought by the Marshall Islands alleging that the United States had breached its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons by failing to pursue negotiations for nuclear disarmament.⁸³ The court dismissed the claim, holding both that the treaty did not create an enforceable obligation on the part of the United States and that the claim raised a non-justiciable political question.⁸⁴

One of the highest profile cases in this category is *Republic of Paraguay v. Allen*,⁸⁵ a lawsuit filed by Paraguay against the

80. See *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 365 (1955) (“[T]he ultimate thrust of the consideration of fair dealing . . . allows a setoff or counterclaim based on the same subject matter . . .”).

81. See, e.g., *Republic of Finland v. Pelham*, 26 A.D.2d 35, 36–38 (N.Y. App. Div. 1966) (addressing a claim by Finland that a New York township had violated the 1934 Treaty of Friendship, Commerce and Consular Rights between the United States and Finland by taxing premises owned by Finland and used for governmental purposes).

82. For an historical account of suits brought by foreign states alleging treaty violations, see Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1867–81 (2004).

83. See *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068, 1070 (N.D. Cal. 2015) (discussing the Marshall Islands' action seeking an injunction to compel the United States to comply with treaty obligations).

84. See *id.* at 1073 (holding that “[w]hat constitutes good faith efforts to pursue negotiations on effective measures relating to cessation of the nuclear arms race are determinations for the political branches to make”).

85. 134 F.3d 622 (4th Cir. 1998), *cert. denied*, 523 U.S. 371 (1998).

Commonwealth of Virginia to enforce certain treaty provisions.⁸⁶ That case involved the arrest, detention, and subsequent sentencing to death of Angel Breard, a Paraguayan citizen.⁸⁷ Under the terms of the Vienna Convention on Consular Relations, to which both Paraguay and the United States are party, law enforcement officials of one state arresting a national of another member state must inform him of his right to communicate with a consular officer.⁸⁸ If he so requests, they must then inform the relevant consular officers of the detention and permit them to render assistance.⁸⁹ The police officers who arrested Breard did not comply with these requirements, and Paraguay alleged injury to its sovereign interest in protecting its citizens abroad.⁹⁰ The Government sought relief, including the vacation of the conviction.⁹¹

In denying a petition for certiorari, the Supreme Court stated that “neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States’ courts to set aside a criminal conviction and sentence for violation of consular notification provisions.”⁹² It further held that the Eleventh Amendment provided the Commonwealth of Virginia with immunity from a lawsuit initiated by a foreign sovereign.⁹³

Cases such as these squarely raise questions regarding the deference of the judiciary to the executive branch in interpreting and applying treaties, as well as questions regarding the direct operation of international law within our legal system.⁹⁴ They do

86. *Id.* at 624–26.

87. *Id.* at 624–25.

88. Vienna Convention on Consular Relations, art. 36, Mar. 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 261 (1967).

89. *Id.*

90. *Republic of Paraguay*, 134 F.3d at 625–26.

91. *Id.*

92. *Breard v. Greene*, 523 U.S. 371, 377 (1998).

93. *Id.* at 377–78 (citing *Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934)). For further discussion, see Curtis Bradley & Jack Goldsmith, *The Abiding Relevance of Federalism to United States Foreign Relations*, 92 AM. J. INT’L L. 675 (1998) (describing reactions of the international legal community to the *Breard* decision).

94. For other examples of such claims, see *Federal Republic of Germany v. United States*, 526 U.S. 111, 111–12 (1999) (seeking an injunction prohibiting

not, however, raise concerns regarding the appropriateness of suit in a U.S. court.

A less complicated form of litigation in this category involves claims arising in connection with the United States' obligations under multilateral trade agreements. In several cases, governments have sought injunctions preventing the Department of Commerce from conducting countervailing duty investigations of particular products from their countries⁹⁵ or challenging the Department's anti-dumping determinations.⁹⁶

5. Claims for Monetary Relief for Damages Suffered in Connection with Unlawful Conduct Occurring Within the Foreign State

This category includes a wide variety of claims. While all involve conduct occurring within the territory of the sovereign plaintiff, some are brought against the U.S. and others against foreign defendants. Moreover, some assert claims pursuant to foreign law, while others are brought under U.S. law (including various forms of regulatory law).

In several cases, foreign governments seek damages for environmental harms allegedly caused by the activity of U.S. corporations. One of the earliest and most prominent examples of this sort of litigation is the claim against Union Carbide Corporation for damages caused by the gas explosion disaster in Bhopal, India, in the 1980s.⁹⁷ More recent examples include complaints filed in 2007 by several provinces within the Republic

Arizona's execution of a German citizen pending resolution of a case before the International Court of Justice, arguing that this execution would violate the Vienna Convention on Consular Relations); *United Mexican States v. Woods*, 126 F.3d 1220, 1221–22 (9th Cir. 1997) (concerning a claim that Arizona's execution of a Mexican citizen would violate the Vienna Convention, as well as two other treaties).

95. See, e.g., *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1275–76 (Ct. Int'l Trade 2007) (seeking an injunction to stop an investigation of trade in coated free sheet paper).

96. See, e.g., *Empresa Nacional Siderurgica, S.A. v. United States*, 880 F. Supp. 876, 877 (Ct. Int'l Trade 1995) (challenging a dumping determination of the Department of Commerce regarding imports of steel plates).

97. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 197–98 (2d Cir. 1987) (addressing personal injury and wrongful death actions brought by private plaintiffs, as well as the government of India).

of Ecuador against a U.S. corporation with which the government of Colombia had contracted to exterminate cocaine plantations.⁹⁸ These complaints alleged that the defendant oversprayed fumigants into Ecuadorian territory, causing environmental damage to land and water sources and exposing residents to toxic chemicals.⁹⁹ The governments sought compensatory as well as punitive damages.¹⁰⁰

Other claims brought by foreign governments against U.S. defendants have a more transnational aspect in that they seek the application of U.S. rather than foreign law, even though the damages in question occurred outside the United States. Some have been brought against U.S. companies pursuant to U.S. antitrust¹⁰¹ or securities law.¹⁰² The majority of these claims are initiated under the Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁰³ and include a number of cases against large U.S. tobacco companies.¹⁰⁴ Many of these claims involve not only U.S. but also foreign defendants.¹⁰⁵ In 2008, for example, the Republic of Iraq initiated litigation against over

98. See, e.g., Complaint ¶¶ 27–67, *Province of Esmeraldas, Republic of Ecuador v. Dyncorp Aerospace Operations LLC*, No. 07-60311 CIV-MARRA, 2007 WL 1293469 (S.D. Fla. Mar. 6, 2007) (alleging seven claims against a U.S. corporation, including trespass, nuisance, and negligence).

99. *Id.* ¶¶ 13–16.

100. *Id.* ¶¶ 68–70.

101. See *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 315–16 (S.D.N.Y. 1971) (concerning a claim brought by Kuwait against U.S. manufacturers, alleging acts to restrain competition as to foreign sales); *Pfizer v. Lord*, 522 F.2d 612, 613–14 (8th Cir. 1975) (concerning claims brought by India, Iran, the Philippines, and Vietnam alleging a conspiracy to fix prices on antibiotics purchased by those governments).

102. See *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295, 297 (S.D.N.Y. 1991) (seeking application of U.S. securities law in connection with a failed investment).

103. 18 U.S.C. §§ 1961–1968 (2013).

104. These claims are discussed in detail below. *Infra* Part III.A.1; see also *Republic of Colombia v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365, 367–77 (E.D.N.Y. 2007) (addressing a RICO claim against U.S. and foreign liquor manufacturers).

105. See, e.g., *Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 105–08 (2d Cir. 2001) (naming foreign entities, as well as R.J. Reynolds U.S., in its RICO suit); *Republic of Colombia*, 531 F. Supp. 2d at 376–77 (naming U.S. and foreign entities as defendants).

ninety companies, mostly foreign, alleging that their corruption of the United Nations Oil-for-Food Program violated RICO.¹⁰⁶

Finally, some litigation in this category seeks the application of U.S. law to claims against only foreign defendants. Several of these, including claims by certain governments against their former heads of state, involve conduct that bears little or no nexus to the United States. They are discussed in detail below.¹⁰⁷

* * *

The vast majority of claims initiated by foreign governments create no particular foreign relations concerns. This observation applies to most litigation arising from foreign governments' commercial activities. It also applies to requests for judicial assistance, which arise within the framework of existing treaties between the United States and the foreign government plaintiff.¹⁰⁸ Indeed, in this sense the review above simply confirms what is evident from a review of judicial activity more generally: U.S. courts are already deeply engaged in ordinary processes of the transnational order.¹⁰⁹ These cases

106. *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 524 (S.D.N.Y. 2013), *aff'd*, 768 F.3d 145 (2d Cir. 2014).

107. *Infra* Part III.A.3.

108. Even the cases brought under § 1782 generate few separation of powers concerns, because they involve rights to judicial assistance that have been bestowed on the foreign governments by statute. 28 U.S.C. § 1782 (2012).

109. U.S. courts frequently apply international or foreign substantive law in ordinary civil litigation between private parties. For instance, the Convention on Contracts for the International Sale of Goods governs contracts entered into by parties in different member states if they have not selected another governing law. *See* Final Act of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, annex I (Apr. 10, 1980), *reprinted in* 19 I.L.M. 668, 668 (1980). Under ordinary choice of law rules, U.S. courts frequently apply foreign law to tort or contract claims. U.S. courts also engage in transnational litigation process when they play the role assigned to them under various procedural treaties. Under the New York Arbitration Convention, for instance, they are charged with recognizing and enforcing foreign arbitral awards that meet certain basic requirements. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 330 U.N.T.S. 3. Under a number of procedural law conventions, they are charged with carrying out functions such as discovery within certain parameters. *See, e.g.*, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241; *see also* Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 69 (2009) (noting that “domestic courts are pervasively involved in the regulation of transnational activity”); *id.* at 74–96

establish a baseline of relatively routine interaction between U.S. courts and foreign governments—interaction that often directly supports the interests of those governments, as well as those of the United States. Furthermore, of the cases that do implicate foreign relations, most are initiated in the United States for readily understandable reasons (for instance, because the defendant is a corporation based in the United States).

However, foreign governments sometimes initiate litigation in U.S. courts under the very circumstances that in other contexts are seen to create interference with foreign sovereign interests. The data described above include claims that are far more closely connected with other countries than with the United States, raising questions regarding the appropriateness of U.S. judicial involvement. They include claims that seek the application of U.S. regulatory law to foreign conduct—in other words, inviting the extraterritorial application of U.S. law. And the data include claims in which foreign governments seek remedies such as treble damages and punitive damages that they have, in other contexts, criticized as violating their own public policies.¹¹⁰

The strategic objectives of foreign sovereigns in filing such claims vary, and are difficult to ascertain definitively. The goal of this study is to investigate more closely the legal and policy arguments included in the governments' complaints, using them as a lens through which to consider the prevailing narrative regarding U.S. judicial engagement.

III. Revisiting the Foreign Relations Narrative

This Part presents three case studies, using them to investigate more closely the foreign policy implications of U.S. judicial engagement in matters involving foreign sovereigns. It

(providing a systematic analysis of their global governance functions).

110. See, e.g., *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 309 (1978) (“In this case we are asked to decide whether a foreign nation is entitled to sue in our courts for treble damages under the antitrust laws. The respondents are the Government of India, the Imperial Government of Iran, and the Republic of the Philippines.”).

then uses that analysis to revisit the traditional account of U.S. judicial activity as it affects foreign sovereign interests.

A. Case Studies

1. Tobacco Litigation

A significant number of foreign governments have initiated litigation in U.S. courts against both U.S. and foreign tobacco producers. Plaintiffs include Belize, Bolivia, several states of Brazil, Canada, Ecuador, Guatemala, Honduras, the Marshall Islands, Nicaragua, Panama, Russia, Tajikistan, Ukraine, and Venezuela.¹¹¹ In addition, the European Community initiated litigation on its own behalf and on behalf of twenty-six member states of the European Union.¹¹²

The complaints in these cases articulate several different reasons for the decision to sue in the United States. First, several of the complaints take note of garden-variety jurisdictional or other barriers that block access to foreign courts. In one case, for example, the plaintiff stated that

Honduras brings these claims in this jurisdiction [Southern District of Florida] since it can obtain personal jurisdiction over the Defendants in one location and much of the evidence is in this jurisdiction. Furthermore, the Republic of Honduras

111. See generally *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003) (addressing consolidated claims of the Republic of Belize, the Republic of Ecuador, and the Republic of Honduras); *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192 (D.D.C. 2002) (addressing consolidated claims of the Republic of Ecuador, the Republic of Venezuela, the Russian Federation, and the Brazilian states of Mato Grosso Do Sol, Goais, and Espirito Santo); *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068 (D.D.C. 2001) (addressing consolidated claims Republic of Guatemala, the Republic of Nicaragua, and Ukraine); *Att'y Gen. of Can. v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000); *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999); *Republic of Panama v. Am. Tobacco Co.*, 2006 WL 1933740 (Del. Super. Ct. 2006) (addressing claims of Panama and the State of Sao Paulo, Brazil); *Answer, Republic of Tajikistan v. Brooke Group Ltd. Inc.*, No. 01-607-Civ-Moore/O'Sullivan, 2001 WL 34621727 (S.D. Fla. Feb. 21, 2001); *Complaint, Citizens of the Republic of the Marshall Islands v. Am. Tobacco Co.*, No. 00000, 1997 WL 33633052 (D. Haw. June 1997).

112. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2nd Cir. 2014), cert. granted, 136 S. Ct. 28 (2015).

is investigating its prosecutorial options with respect to the responsible parties, but is not likely to obtain jurisdiction in Honduras at this point, over those individuals and defendants.¹¹³

Second, some of the complaints assert that the individuals affected by the defendants' conduct would be unable to obtain compensatory relief in their own countries. For instance, many of the tobacco claims brought by developing countries included requests by the foreign governments to be accorded *parens patriae* standing in order to represent the interests of citizens lacking local redress. The governments of Panama and the State of Sao Paulo, for instance, argued that the individuals harmed by tobacco use would have no meaningful opportunity to seek compensation locally, and therefore that the governments should be permitted to represent their interests in U.S. litigation.¹¹⁴ Third, many of the claims appear to be in a U.S. forum because the plaintiff seeks the application of U.S. regulatory law, such as RICO or antitrust law.¹¹⁵

The theories on which these lawsuits proceeded differ. One group of claims alleged that the tobacco companies participated in smuggling conspiracies that harmed the foreign governments in question by depriving them of tax revenue and increasing their law enforcement costs. The Canadian government, for instance,

113. First Amended Complaint ¶ 2, *Republic of Honduras v. Philip Morris Int'l, Inc.*, No. 01-2847-Civ-Moreno/O'Sullivan, 2001 WL 34680245 (S.D. Fla. Dec. 20, 2001).

114. See *Republic of Panama v. Am. Tobacco Co.*, No. 05C-07-181-RRC, 2006 WL 1933740, at *8 (Del. Super. Ct. June 23, 2006) (consolidating claims by Panama and the State of Sao Paulo, Brazil). The court was unreceptive to this argument, stating that

[i]f this Court accepted the Foreign Governments' argument, that *parens patriae* standing might be applicable in Delaware Superior Court to some countries in this world, but not to others (because of considerations of whether or not a particular country . . . was sufficiently "developed" or not) that would create a near-impossible burden for this Court

Id.

115. Because a foreign court will not apply U.S. regulatory law, such claims must necessarily be brought in the United States. See Philip J. McConaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 262 (1999) (tracing this principle to "the centuries old refusal of nations to enforce the penal or revenue laws of other nations").

argued that the defendants established a cross-border smuggling scheme that resulted in cigarettes being sold on the black market rather than through taxed channels of commerce.¹¹⁶ The purpose and effect of this scheme, the Government argued, was to deprive it of the duties and taxes that otherwise would have been payable upon the sale of the cigarettes.¹¹⁷ The Government also argued that the scheme caused further harm by requiring the government to expend additional funds on enforcement activity intended to end the unlawful behavior.¹¹⁸ The governments of Belize, Ecuador, and Honduras brought similar lawsuits alleging the use of free trade zones to insulate the goods from taxation.¹¹⁹ These claims alleged that the defendants' schemes to avoid local taxes violated RICO, along with other U.S. state and common laws.¹²⁰

The courts hearing these lawsuits eventually dismissed them on the basis of the so-called "revenue rule," which provides that the courts of one country will not enforce tax claims, or judgments for the payment of taxes, of another sovereign.¹²¹ The respective

116. See *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 138 (N.D.N.Y. 2000) (arguing that the alleged cross-border smuggling scheme arose following tax increases on tobacco products, which, in Canada, rose 550% between 1982 and 1991), *aff'd*, 268 F.3d 103 (2d Cir. 2001).

117. See *id.* at 137–38 (alleging that defendant tobacco company, its subsidiaries, and the Canadian Tobacco Manufacturers Council implemented the scheme to stave off declining profits).

118. *Id.* at 143.

119. See *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1360 (S.D. Fla. 2002) (seeking damages for lost tax revenues and additional law enforcement expenses incurred as result of the defendants' alleged involvement in tobacco smuggling), *aff'd*, *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1255 (11th Cir. 2003) (consolidating six separate appeals by the Republics of Belize, Ecuador, and Honduras).

120. See *R.J. Reynolds Tobacco Holdings*, 103 F. Supp. 2d at 149 (noting that Canada brought claims against the defendants under RICO's civil enforcement provision); *Republic of Ecuador*, 188 F. Supp. 2d at 1362 ("Ecuador brings state law common law causes of action for fraud, intentional misrepresentation, conspiracy and concert of action . . . Additionally, Ecuador asserts causes of action under the Florida RICO statute.").

121. See *Pasquantino v. United States*, 544 U.S. 349, 360–61 (2005) (considering application of the revenue rule in the context of a criminal prosecution, rather than a civil lawsuit); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 483 (AM. LAW INST. 1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other

courts held that although the claims were brought under RICO, the ultimate goal of the litigation was to enforce foreign revenue laws.¹²² In affirming the dismissal of the claims of Belize, Ecuador, and Honduras on the basis of the revenue rule, the U.S. Court of Appeals for the Eleventh Circuit explored the doctrine's rationale.¹²³ Under the heading "Respect for Sovereignty," it cited the two major justifications for the rule. First, it "exists to prevent the courts of a sovereign nation from enforcing policy choices of a foreign sovereign that might run counter to its own."¹²⁴ Second, it "promote[s] harmony between sovereigns by preventing one sovereign from asserting its political will in another sovereign through actions to enforce its revenue laws."¹²⁵

Other tobacco litigation did not focus on lost tax revenue, but rather on the harms caused in the foreign countries by the defendants' products.¹²⁶ Venezuela's complaint, for instance, stated:

states."). For a critical review of the doctrine, see William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 266–87 (2000) (criticizing application of the revenue rule in cases brought by foreign sovereign plaintiffs).

122. See, e.g., *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 143 (N.D.N.Y. 2000) ("[T]o pursue its claim for damages relating to lost tax revenue, Canada will have to prove, and the Court will have to pass on, the validity of the Canadian revenue laws and their applicability hereto and the Court would be, in essence, enforcing Canadian revenue laws."), *aff'd*, 268 F.3d 103 (2d Cir. 2001); see also *European Comty. v. RJR Nabisco, Inc.*, 424 F.3d 175, 182–83 (2d Cir. 2007) (affirming dismissal of claims by the European Community, along with a number of Colombian states, on the basis of the revenue rule).

123. *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256–59 (11th Cir. 2003).

124. *Id.* at 1257.

125. *Id.* For another example of this application of the revenue rule, see *Republic of Colombia v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365, 375–76 (E.D.N.Y. 2007) (involving a claim against U.S. and foreign liquor manufacturers). Colombia alleged that a group of liquor manufacturers participated in a scheme to launder the proceeds of illegal drug sales and smuggle liquor into Colombia. *Id.* at 375. The court determined that to the extent the claims were based on (a) damages resulting from unpaid taxes on alcohol, or (b) damages suffered by Colombia in its sovereign capacity, they were barred by the revenue rule. *Id.* at 391. It declined, however, to dismiss the claims that were based on damages flowing from money laundering. *Id.* at 398.

126. These claims paralleled the litigation brought by U.S. state attorneys general against the tobacco industry. See generally *Ieyoub & Eisenberg*, *supra* note 31 (describing U.S.-based litigation against the tobacco industry).

For decades, BIG TOBACCO's conduct has caused an incalculable loss of life, disease . . . and economic loss to the users of BIG TOBACCO's products which economic loss was and is ultimately borne by the Republic as the provider of medical assistance to the users Furthermore, the Republic has suffered economic damages as a result of the decreased productivity of its labor force¹²⁷

A number of other governments, including that of Guatemala, filed similar complaints, alleging violations of RICO, antitrust law, and common law.¹²⁸ The complaints emphasized that the governments had suffered direct injury, in the form of "economic harms to their treasuries that are independent of any harms allegedly suffered by their residents as a result of smoking defendants' products."¹²⁹ U.S. courts have generally rejected these claims for lack of proximate cause. In the Guatemalan case, for example, the court concluded that the government failed to establish that its "claimed economic harms were not caused by other independent factors."¹³⁰ These decisions also invoke the principle that a party who pays for the medical expenses of an injured individual may not generally bring an independent action to recover those expenses from the party who caused the injury.¹³¹

127. See Complaint for Damages ¶ 44, *Republic of Venezuela v. Philip Morris Cos.*, No. 99-01943 CA25, 1999 WL 33740594 (Fla. Cir. Ct. Jan. 27, 1999) (alleging violations of both foreign and Florida tort law, as well as several Florida statutes).

128. See *In re Tobacco/Governmental Health Care Costs Litig.*, 83 F. Supp. 2d 125, 127–28 (D.D.C. 1999), *aff'd sub nom.*, *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1071 (D.C. Cir. 2001) (considering on appeal the claims of Guatemala, Nicaragua, and Ukraine); see also *Republic of Panama v. Am. Tobacco Co.*, No. 05C-07-181-RRC, 2006 WL 1933740, at *1 (Del. Super. Ct. June 23, 2006) (consolidating claims by Panama and the State of Sao Paulo, Brazil that seek the application of Panamanian and Brazilian law).

129. See *Serv. Emps. Int'l Union Health & Welfare Fund*, 249 F.3d at 1071 (asserting that, because the government is obligated to provide free health care and other forms of social welfare to citizens, the nation itself is the appropriate plaintiff to recover damages).

130. See *id.* at 1074 (commenting on the "derivative nature of the alleged injuries").

131. See *Republic of Venezuela v. Philip Morris Cos.*, 827 So. 2d 339, 341 (Fla. Dist. Ct. App. 2002) (noting that "case precedent and settled common-law principles establish that one who pays for the medical expenses of another, may not bring a direct, independent action to recover those expenses from the alleged

One major lawsuit in this category is still pending: that of the European Community. While the court dismissed the first set of claims by the European Community on the basis of the revenue rule,¹³² the Community later filed additional complaints against tobacco companies.¹³³ These claims did not focus on lost tax revenue:

The Complaint alleges that RJR directed, managed, and controlled a global money-laundering scheme with organized crime groups in violation of the RICO statute, laundered money through New York-based financial institutions and repatriated the profits of the scheme to the United States, and committed various common law torts in violation of New York state law.¹³⁴

The U.S. Court of Appeals for the Second Circuit permitted the extraterritorial application of RICO to the defendants' conduct, given the circumstances of the case.¹³⁵ It therefore vacated the decision of the district court, granted the defendants' motion to dismiss, and remanded the case.¹³⁶ Following two unsuccessful

tortfeasor"); *see also* Sean D. Murphy, *Guatemalan Suit Against U.S. Tobacco Companies*, 94 AM. J. INT'L L. 541, 541–43 (2000) (summarizing Guatemala's suit against U.S. tobacco companies and the requirements for standing in a *parens patriae* action).

132. *See* European Cmty. v. RJR Nabisco, Inc., 424 F.3d 175, 182 (2d Cir. 2007) (“[U]nder any of the available formulations of the revenue rule, plaintiffs’ claims are barred.”).

133. *See* European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771, 2011 WL 843957, at *1 (E.D.N.Y. Mar. 8, 2011) (concerning five alleged violations of the RICO Act and nine common law torts in relation to the defendants’ cigarette sales practices). For a summary of the history of the European Community’s litigation, *see id.* at *1–2.

134. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 133 (2d Cir. 2014).

135. *See id.* at 139 (“[B]ecause Plaintiffs have alleged that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders, we conclude that the Complaint states domestic RICO claims based on violations of those predicates.”). The court’s application of the presumption against extraterritoriality is discussed further below.

136. *Id.* at 149.

attempts to obtain rehearing,¹³⁷ the defendants filed a petition for certiorari, which has been granted.¹³⁸

2. *Environmental Damage*

In 2006, the Dominican Republic filed a complaint in the U.S. District Court for the Eastern District of Virginia against AES Corporation, a utility company headquartered there.¹³⁹ Through subsidiaries, including one in the Dominican Republic, AES operated a number of power plants.¹⁴⁰ The complaint alleged that AES and several Dominican companies and individuals (including elected officials) conspired to dump tons of coal ash waste generated by AES's Puerto Rican plant in the Dominican Republic, damaging the environment and creating health risks for local citizens.¹⁴¹ The complaint sought compensatory and punitive damages under both U.S. and Dominican law, including RICO, the Alien Tort Statute, and environmental law.¹⁴²

The Government filed the complaint in the U.S. court where the defendant was subject to general jurisdiction.¹⁴³ However, that was not its only reason for filing the lawsuit there. First, the Government gestured toward the difficulty it experienced as host to foreign investment in effectively regulating the activities of

137. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 149, 152 (2d Cir. 2014) (denying rehearing); *European Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 124 (2d Cir. 2015) (denying rehearing en banc).

138. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 28 (2015).

139. First Amended Complaint ¶ 1, *Government of the Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680 (E.D. Va. 2006) (No. 06-313).

140. *See id.* ¶¶ 4–5 (noting that AES is one of the world's largest power companies and “operates its day-to-day business through more than 700 subsidiaries”).

141. *See id.* ¶ 11 (alleging that AES conspired with multiple companies based in the Dominican Republic to dump coal ash waste without having to pay the higher costs associated with proper disposal).

142. *See id.* ¶¶ 92–128 (listing a total of seven claims against AES).

143. This is true of other cases in this category. In another lawsuit arising from environmental harm, for instance, provinces of the Republic of Ecuador argued that they would not have access to relief in the courts of Ecuador because personal jurisdiction could not be obtained there over the U.S. corporate defendants. Complaint ¶ 2, *Province of Sucumbios v. Dyncorp Aerospace Operations LLC*, No. 06-61926 Civ-Altonaga, 2006 WL 4035611 (S.D. Fla. Dec. 2006).

large transnational corporations. The complaint included certain allegations speaking to the balance of power between the local government and the defendant corporation:

5. Defendant AES operates its day-to-day business through more than 700 subsidiaries. . . . Defendant AES constructed this elaborate web of subsidiaries to protect the “parent” company from legal and financial liabilities resulting from its global operations.

20. . . . The AES Defendants are the largest direct foreign investor in the economy of the Dominican Republic. . . . The economic strength of the AES defendants (with a market capitalization of \$11.15 billion compared to the Dominican Republic’s gross domestic product of \$55.68 billion)¹⁴⁴

Second, the Government raised more general capacity arguments regarding its own judiciary. The complaint included a passage specifically addressing the sorts of sovereignty concerns that might arise in this type of claim:

20. Plaintiff cannot file this action and obtain justice in the courts of the Dominican Republic. Although Plaintiff is striving to improve the judicial system of the Dominican Republic, the present judicial system is not able to resolve this particular action in a fair and impartial manner. . . . [T]he Dominican Republic [has] a valid and well-founded fear that the present judicial system may be susceptible to being influenced by corruption.

21. Plaintiff will not view this Court’s exercise of jurisdiction over this action as an affront or intrusion into the sovereign affairs of the Dominican Republic. On the contrary, this action is an affirmation of national sovereignty as it seeks redress of grievances within its territory in a venue where the perpetrator of the grievance has legal residence. Plaintiff, the government of the Dominican Republic, has determined that it furthers the national and sovereign interests of the Dominican Republic and its citizens to seek compensation in the federal courts of the United States for the unlawful acts of American corporations.¹⁴⁵

The complaint in this case did not seek *parens patriae* standing; rather, the government sought compensation for harm

144. First Amended Complaint ¶¶ 5, 20, *Dominican Republic*, 466 F. Supp. 2d 680 (No. 06-313).

145. *Id.* ¶¶ 20–21.

it suffered directly.¹⁴⁶ Applying traditional standing requirements, the court found that the Dominican Republic had standing to assert the claims based on pollution damage.¹⁴⁷ It concluded, however, that the Government did not have standing “to assert claims for the costs its state-run health system incurred in caring for inhabitants injured by the coal ash pollution.”¹⁴⁸ Because those injuries were suffered by specific individuals, the court held, those individuals would need to assert their own claims individually.¹⁴⁹ The court further concluded that under Virginia choice-of-law principles, the law of the place of the wrong—that is, the law of the Dominican Republic—would apply to the non-RICO claims.¹⁵⁰ The court dismissed the RICO claims on the ground that the plaintiff failed to establish a pattern of racketeering.¹⁵¹

The defendants in this litigation raised the act of state doctrine as a defense, arguing that the case would require the

146. *See id.* ¶¶ 89–91, 129 (seeking compensatory and punitive damages for physical, mental, and economic injuries).

147. *See* *Government of the Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 688 (E.D. Va. 2006) (determining that the Dominican Republic suffered a concrete and particularized injury, that the injury was fairly traceable to the defendant’s conduct, and that its injuries could be redressed in the form of monetary damages).

148. *See id.* (determining that the State was not the proper party to bring a claim based on those costs, even though it arguably suffered a concrete and particularized harm that was traceable to the defendant’s conduct).

149. *Id.* The court noted that the government could assist individuals harmed by the actions of AES in pursuing a legal remedy. *Id.* The court in the *DeCoster* also made this point. *See* *Estado Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 342 (1st Cir. 2000) (“Mexico, however, is not left powerless to address these concerns . . . [It] could financially support the plaintiffs in their efforts or seek to participate as amicus.”).

150. *Id.* at 693. Note that the applicability of foreign law creates a basis at the next stage of litigation for dismissal on the basis of *forum non conveniens*. Some courts have avoided this entire analysis by simply holding that plaintiffs did not adequately establish proof of foreign law, thus opening the way to application of forum law. *See, e.g.,* *Republic of Panama v. Am. Tobacco Co.*, No. 05C-07-181-RRC, 2006 WL 1933740, at *4–5 (Del. Super. Ct. June 23, 2006) (determining that Delaware law would apply to all claims made by the foreign governments).

151. *See* *Dominican Republic*, 466 F. Supp. 2d at 692 (determining that the alleged predicate acts of the defendants did not satisfy the continuity test, necessary to establish a pattern of racketeering under RICO, because the complaint did not indicate that the alleged dumping activities would occur again in the future).

court to adjudicate the validity of a coal ash dumping permit issued by the Dominican Republic.¹⁵² The court rejected this argument, stating that the case turned not on the validity of that act but rather on the effects of the pollution caused by AES.¹⁵³ It also noted:

Given that the Government of the Dominican Republic itself is the plaintiff in this case, the principles that the act of state doctrine was created to uphold should not be adversely affected (i.e., the American executive should not be embarrassed, and international comity and respect for foreign sovereigns will continue).¹⁵⁴

3. Misdeeds of Former Heads of Government

In a number of cases, successor governments initiated litigation in U.S. courts to recover damages suffered as the result of misappropriations by previous heads of government. These include claims brought by the Republic of Chile,¹⁵⁵ the Republic of Haiti,¹⁵⁶ the Islamic Republic of Iran,¹⁵⁷ and the Republic of Panama.¹⁵⁸

The plaintiffs in some of these cases brought claims not against the former head of state himself, but against financial institutions involved in laundering the proceeds of

152. *Id.* at 694–95.

153. *See id.* (emphasizing that the state “doctrine does not take the form of an absolute or inflexible rule, but rather requires a careful case-by-case analysis”).

154. *Id.*

155. *See generally* Amended Complaint, Consejo de Defensa del Estado de la Republica de Chile v. Banco Santander Central Hispano, S.A., No. 09-20621, 2009 WL 2336429 (S.D. Fla. May 29, 2009) (relating to misappropriations by Augusto Pinochet); Complaint & Demand for Jury Trial, Consejo de Defensa del Estado de la Republica de Chile v. Banco de Chile, No. 109CV20614, 2009 WL 1612255 (S.D. Fla. Mar. 11, 2009) (same).

156. *See* Complaint at 11, Republic of Haiti v. Aristide, No. 05-22852, 2005 WL 3521251 (S.D. Fla. Nov. 2, 2005) (stating claims against Jean-Bertrand Aristide under RICO for “theft, conversion, fraud and breach of fiduciary duty”).

157. *See generally* Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487 (N.Y. App. Div. 1983) (concerning misappropriations by the former Shah, Mohammed Reza Pahlavi).

158. *See generally* Republic of Panama v. BCCI Holdings, 119 F.3d 935 (11th Cir. 1997) (concerning misappropriations by Manuel Noriega).

misappropriation. Chile, for example, sued both U.S. and foreign banks under RICO, alleging that they had participated in money laundering.¹⁵⁹ Panama initiated a similar lawsuit against U.S. and foreign banks, also asserting RICO claims, alleging that they had participated in Noriega's diversion of public funds.¹⁶⁰ While some of these claims involved only a foreign defendant, they all included allegations of U.S.-based conduct—including in the form of participation by U.S. branches of the defendant banks—as part of the necessarily cross-border capital flows.¹⁶¹

Other lawsuits involved claims against former heads of government themselves, based on conduct that occurred outside the United States. The Republic of the Philippines, for instance, sued Ferdinand and Imelda Marcos for damages related to their theft of money from the public fisc;¹⁶² Iran's claims, similarly, were lodged directly against the former Shah and his relatives.¹⁶³ Such claims raise thorny foreign affairs issues, to which U.S. courts generally respond using the doctrines of act of state and political question. In the litigation against Ferdinand and Imelda Marcos, for example, the U.S. Court of Appeals for the Ninth Circuit began its jurisdictional analysis with this note of caution:

Plaintiff's case is a ringing indictment of Mr. Marcos' conduct as President of the Philippines during his 20 years in office. As such, it challenges not merely individual misdeeds or

159. See Complaint & Demand for Jury Trial, *supra* note 155, ¶ 20 (alleging instances of money laundering by approximately ten U.S. banks).

160. See *Republic of Panama*, 119 F.3d at 938–39 (alleging that BCCI laundered the diverted funds and redistributed them to various accounts throughout the world, which effectively made them available to Noriega for personal use).

161. See Complaint & Demand for Jury Trial, *supra* note 155, ¶¶ 39–41 (alleging links between multiple U.S.-based bank accounts and Pinochet); *Republic of Panama*, 119 F.3d at 940 (alleging links between multiple U.S.-based bank accounts and Noriega).

162. See *Republic of the Philippines v. Marcos*, 818 F.2d 1473, 1480–81 (9th Cir. 1987) (alleging that Marcos and others extorted and embezzled millions of dollars from the Philippine government), *reh'g en banc*, 862 F.2d 1355, 1360–61 (9th Cir. 1988) (en banc) (determining, among other things, that the suit was not barred under the act of state or political question doctrines).

163. See *generally* *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487 (N.Y. App. Div. 1983) (involving claims against Mohammed Reza Pahlavi, the former Shah of Iran); *Islamic Republic of Iran v. Pahlavi*, 473 N.Y.S.2d 801 (N.Y. App. Div. 1984) (involving claims against Ashraf Pahlavi, Mohammed Reza Pahlavi's sister).

indiscretions but the very way in which Mr. Marcos wielded governmental power, retained that power and ran the Philippine government. This raises a variety of serious and sensitive questions about the ability of our courts to adjudicate this issue, and the propriety of their doing so. In effect, we must consider whether our courts are the appropriate forum for adjudicating what appears to be at least in part a political dispute between the Philippines' current government and its former ruler.¹⁶⁴

The Ninth Circuit heard the claims twice, first by a panel and then in rehearing en banc.¹⁶⁵ The court reached different conclusions in each opinion regarding the act of state and political question doctrines. The panel concluded that the act of state doctrine precluded the plaintiff's claims because they would require the court to adjudicate whether Marcos's actions while serving as President were lawful under Philippine law.¹⁶⁶ Similarly, it characterized the complaint as raising "essentially political questions," again concluding that judicial intervention would be unwise despite "the acquiescence—indeed anxious invitation—of the current Philippine government."¹⁶⁷ In the subsequent rehearing en banc, the court concluded that the act of state doctrine did not insulate a former dictator from claims arising out of his actions, nor did the political question doctrine

164. *Republic of the Philippines*, 818 F.2d at 1480.

165. After the United States granted the Marcoses asylum, the Republic of the Philippines brought claims under RICO, 18 U.S.C. §§ 1961–1968 (1982), and other applicable law. *Republic of the Philippines*, 818 F.2d at 1477. On June 25, 1986, the U.S. District Court for the Central District of California granted a preliminary injunction. *Id.* The Marcoses appealed, and a panel of the Ninth Circuit reversed, with one judge dissenting. *Id.* at 1490. Rehearing the case en banc, the Ninth Circuit affirmed the district court. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc) (determining that the district court had the authority "to issue a preliminary injunction to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies"), *cert. denied*, 490 U.S. 1035 (1989).

166. *See Republic of the Philippines*, 818 F.2d at 1482 (distinguishing between challenged actions undertaken by the government itself and those undertaken by Ferdinand Marcos as a private citizen).

167. *See id.* at 1486, 1489 ("We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effect of its conduct and resolution.").

insulate him from claims arising out of “acts for personal profit.”¹⁶⁸

In a pair of cases, the Islamic Republic of Iran initiated litigation in New York state courts against Mohammed Reza Pahlavi, the former Shah of Iran, and Ashraf Pahlavi, his sister.¹⁶⁹ Iran’s claims alleged that the defendants violated fiduciary obligations under the law of Iran by converting government and public assets for personal use.¹⁷⁰ They sought both equitable relief (in the form of the imposition of a constructive trust on all assets of the defendants) and monetary relief (in the form of both compensatory and punitive damages).¹⁷¹ The court ultimately dismissed both of these cases on the basis of *forum non conveniens*.¹⁷² In each case, the court noted that the claims related not only to the ownership of particular property within the forum state, but rather to “all monies and property” defendants received from the Iranian government, wherever located.¹⁷³ As a result, the litigation would

168. See *Republic of the Philippines*, 862 F.2d at 1360–61 (noting that the act of state doctrine “is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader” and that “questions of foreign law are not beyond the capacity of our courts”).

169. *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487, 488 (N.Y. App. Div. 1983); *Islamic Republic of Iran v. Pahlavi*, 473 N.Y.S.2d 801, 801–02 (N.Y. App. Div. 1984).

170. See *Islamic Republic of Iran*, 464 N.Y.S.2d at 489 (alleging “misconduct of the Shah in enriching himself and his family through the exercise and misuse of his powers as emperor”); *Islamic Republic of Iran*, 473 N.Y.S.2d at 802 (alleging misconduct enriching the sister of the Shah).

171. See *Islamic Republic of Iran*, 464 N.Y.S.2d at 490 (discussing relief sought by the plaintiff–government); *Islamic Republic of Iran*, 473 N.Y.S.2d at 801 (same).

172. See *Islamic Republic of Iran*, 464 N.Y.S.2d at 489–92 (determining that the Shah’s stay at a New York hospital, which only lasted a few weeks, and the presence of some of his assets in the state were insufficient to support jurisdiction); *Islamic Republic of Iran*, 473 N.Y.S.2d at 802 (concluding that the “action did not bear a substantial nexus to the State of New York,” even though the plaintiff–respondent sought in *rem* jurisdiction).

173. See *Islamic Republic of Iran*, 464 N.Y.S.2d at 490 (“[T]his is not a case of a dispute as to the ownership of specific property in this state. The complaint asks to impress a constructive trust on assets of the defendants throughout the world”); *Islamic Republic of Iran*, 473 N.Y.S.2d at 802 (noting that the plaintiff sought “worldwide access” to the defendant’s assets). In this respect the cases were quite different from those in which the plaintiff sought relief regarding specific assets located within the United States. See, e.g., *Republic of*

involve “a sweeping review of the political and financial management of the Iranian government . . . with the object of accounting for and repossessing the nation’s claimed lost wealth”¹⁷⁴—a project with only a slight nexus to New York. In that light, the courts concluded, there was insufficient justification to deploy local judicial resources.¹⁷⁵ The courts cited the particularly burdensome nature of the litigation, the overcrowded state of New York courts, and the potential cost to New York taxpayers.¹⁷⁶

B. Analysis

Even within this smaller group of claims, there is a wide range of relationships between the parties, the cause of action, and the United States. Some of the cases involve U.S. defendants, for instance, and others only foreign defendants; some arise from conduct occurring within the United States and others from conduct occurring entirely elsewhere. As a result, the strength of the connection between the claim and the United States—and the relative strength of the connection between the claim and some other country—varies significantly from case to case.

Moreover, the claims vary with respect to the relationship between the choice of forum and applicable law. For claims initiated under private law (for instance, tort law), the choice of a U.S. forum would not generally result in any substantive law

the Philippines v. Marcos, 806 F.2d 344, 361 (2d Cir. 1986) (affirming the district court’s refusal to dismiss on the basis of forum non conveniens where the injunction sought related only to property located in New York).

174. Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 250 (N.Y. 1984).

175. See Islamic Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487, 489 (N.Y. App. Div. 1983) (declaring that the claims do not legitimately concern the State of New York, and that they are uniquely Iranian matters “based on acts in Iran relating to the affairs of Iran”); Islamic Republic of Iran v. Pahlavi, 473 N.Y.S.2d 801, 802 (N.Y. App. Div. 1984) (“[W]e remain convinced that New York’s connection with all of this is, at best, tenuous and the better approach is to exercise our discretion and reject this action.”).

176. See *Islamic Republic of Iran*, 464 N.Y.S.2d at 489 (“It would be an understatement to say that this lawsuit would be as burdensome as a total of hundreds of ordinary lawsuits.”); *Islamic Republic of Iran*, 473 N.Y.S.2d at 802 (describing the potential costs of litigation to the taxpayers and courts of New York).

advantage: A U.S. court would be expected, following ordinary choice-of-law analysis, to apply the law of the state where the harm occurred.¹⁷⁷ (The plaintiffs may of course seek certain procedural advantages associated with litigation in U.S. courts, such as more extensive discovery of evidence.) Some of the claims, however, seek application of U.S. regulatory law. Because no foreign court would apply such law,¹⁷⁸ the foreign government plaintiffs may have initiated litigation in the United States precisely in order to access particular substantive rights.

An initial observation to draw from these case studies, then, is simply that the foreign-relations consequences of U.S. judicial engagement in the global arena resist easy generalization. The sections below explore two further implications of this form of litigation for debates over the transnational engagement of U.S. courts.

1. Cooperative Unilateralism?

One theme of the traditional foreign relations narrative regarding the role of domestic courts is that private enforcement strategies are not complementary to multilateral strategies, but are rather in opposition to them. This attitude is reflected particularly clearly in the context of the revenue rule. One of the justifications offered in defense of that doctrine is that by refusing to assist foreign sovereigns in enforcing their own laws, U.S. courts encourage them to negotiate multilateral solutions to cross-border regulatory challenges.¹⁷⁹ This argument sees private

177. See *Government of the Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 693–94 (E.D. Va. 2006) (finding that, under Virginia choice-of-law principles, the law of the Dominican Republic applied because the coal ash was dumped in the Dominican Republic). Similarly, in the Bhopal litigation, the court assumed—as is consistent with choice-of-law principles—that the tort claims would be decided under the laws of India, where the accident occurred. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 201 (2d Cir. 1987) (“[P]laintiffs have conceded that in view of India’s strong interests and its greater contacts with the plant, its operations, its employees, and the victims of the accident, the law of India, as the place where the tort occurred, will undoubtedly govern.”).

178. In general, the courts of one country will not apply the public regulatory law of another. See generally *supra* note 111 and accompanying text.

179. See William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L

enforcement as a purely unilateral form of regulation, undermining other forms of transnational governance that sovereign states have jointly designed. It has found more general expression across substantive contexts. Many commentators have argued that negotiated multilateral solutions to global problems are preferable to unilateral regulation by individual countries, including in the form of private enforcement, because they build on the mutual consent of the states involved.¹⁸⁰

What several of the claims initiated by foreign governments reveal, however, is that the private enforcement of regulatory law can be viewed as compatible with multilateral governance efforts.¹⁸¹ Consider, for example, an argument made by Honduras in its RICO claim against the tobacco manufacturers:

Treaties and agreements between Honduras and the United States call for cooperation between the United States and Honduras with respect to government efforts to combat transnational crime and customs fraud. Those treaties and agreements also confirm that the United States and Honduras have a joint and unified interest in and objective in assuring the accurate assessment and collection of customs duties and other fees and charges. The United States and Honduras have determined that smuggling operations in breach of their respective agreements and understandings are harmful to the

L.J. 161, 234–35 (2002) (setting out the argument that withholding such assistance “encourage[s] non-cooperating countries to come to the bargaining table,” fostering a higher level of mutual enforcement).

180. See, e.g., Donald I. Baker, *Extraterritoriality and the Rule of Law: Why Friendly Foreign Democracies Oppose Novel, Expansive U.S. Jurisdiction Claims by Non-Resident Aliens Under the Alien Tort Statute*, 28 MD. J. INT’L L. 42, 64 (2013) (arguing that, in the context of human rights litigation, “the United States ought to be looking more to multilateral cooperation” than to unilateral private enforcement); Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 874 (2009) (arguing that international law governed by consent-based rules “leads to political legitimacy and meaningful enforcement” but that “[g]lobal governance based on extraterritorial domestic laws is an unsustainable and unstable system” to address international challenges); Alfred P. Rubin, *Can the United States Police the World?*, 13 FLETCHER F. WORLD AFF. 371, 374 (1989) (“Our actions would be more effective if aimed at achieving international cooperation in ways consistent with the international legal order instead of simply asserting wider American prescriptive, adjudicatory, and enforcement jurisdiction.”).

181. The following analysis of the filings in the tobacco cases draws in part on Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 267–68 (2006).

economic, fiscal and commercial interests of both countries, and, accordingly, it is to their mutual benefit to eliminate and remedy the effects of such operations.¹⁸²

At its core, this is an argument about the regulatory gaps in the international system and the possibility that litigation in domestic courts, under domestic law, can fill them. The European Community's brief in its initial tobacco lawsuit before the U.S. Court of Appeals for the Second Circuit presented this argument particularly clearly.¹⁸³ It argued that the application of the revenue rule would undermine RICO's purpose, and explicitly discussed the role of civil actions in U.S. courts as one of a larger set of transnational enforcement strategies:

RICO's object is "not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." With scarce prosecutorial resources in the U.S. largely committed to the war on terrorism, the "private attorneys general" here are the ones motivated and able to pursue transnational organized crime directed against foreign allies.¹⁸⁴

In support of this suggestion, the brief cited at length the legislative history of the Patriot Act, including a statement assuring that "our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism."¹⁸⁵ The brief concluded that "only the U.S. courts are situated, equipped, and empowered to enjoin" the conduct in question.¹⁸⁶

182. First Amended Complaint ¶ 7, *Republic of Honduras v. Philip Morris Int'l, Inc.*, No. 01-2847-Civ-Moreno/O'Sullivan, 2001 WL 34680245 (S.D. Fla. Dec. 20, 2001).

183. Brief for Plaintiff-Appellants at 45-46, *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005) (Nos. 02-7330, 02-7325).

184. *Id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 557 (2000)).

185. *See id.* at 30-32 (citing statement of Senator Kerry); *see also id.* at 43 (citing a related statement that "[s]ince some of the money-laundering in the world today also defrauds foreign governments, it would be hostile to the intent of [the Patriot Act] . . . [to] limit our foreign allies access to our courts to battle against money laundering").

186. *See id.* at 9 (contending that the case involved schemes that constituted continuing threats "beyond the practical reach of an injunction of any court in the European Community or the Republic of Colombia").

Other claims alleging money laundering also refer explicitly to the intentionally transnational focus of the regulatory law. In the Colombian case against liquor manufacturers, for instance, the court noted that “Congress’s enactment of a private RICO cause of action predicated on international money laundering evinces a determination that federal courts should hear such claims, which will almost universally involve evidence located abroad.”¹⁸⁷ In these cases, then, foreign sovereigns consent to regulation under U.S. law, in the form of private enforcement in U.S. courts—suggesting the intriguing possibility of a sort of cooperative unilateralism.¹⁸⁸

2. Access to Justice

The arguments made by various governments seeking access to U.S. courts reveal profound and persistent disparities among countries in the level of resources available to regulate economic activity. When developed countries invite U.S. courts to engage in matters closely tied to their own jurisdictions—as in the European Community’s case against tobacco companies—they do so not in order to fill a gap in their own regulatory systems, but to address conduct that falls into the transnational space. Many of the claims by developing countries, in contrast, suggest the need to supplement local resources in various ways.¹⁸⁹

Of course, such resource deficiencies cannot be laid at the doorstep of the United States, or indeed of any individual legal system, and the most direct efforts to steer litigation toward the United States have often met justified skepticism.¹⁹⁰ U.S. courts

187. See *Republic of Colombia v. Diageo N. Am., Inc.*, 531 F. Supp. 2d 365, 411 (E.D.N.Y. 2007) (rejecting a motion to dismiss RICO claims on the basis of forum non conveniens).

188. Thanks to Harlan Cohen for suggesting this label for the phenomenon.

189. See *supra* notes 97–100 and accompanying text (foreshadowing the various reasons that developing nations bring claims in U.S. courts, including the inability of those harmed to obtain compensatory relief in their own countries).

190. See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1092–94 (2010) (discussing statutes adopted by a number of Latin American countries in order to deter dismissals on the basis of forum non conveniens, and the reaction of U.S. courts to those statutes).

often apply the revenue rule or the doctrine of forum non conveniens to block such claims, despite the fact that the sovereign in question has consented to their jurisdiction.¹⁹¹ In the *Bhopal* litigation, for instance, the U.S. District Court for the Southern District of New York assessed this sort of capacity argument and concluded that India provided an adequate alternative forum, despite the concerns voiced by the government itself:

Plaintiffs, including the Union of India, have argued that the courts of India are not up to the task of conducting the Bhopal litigation. They assert that the Indian judiciary has yet to reach full maturity due to the restraints placed upon it by British colonial rulers who shaped the Indian legal system to meet their own ends. Plaintiffs allege that the Indian justice system has not yet cast off the burden of colonialism to meet the emerging needs of a democratic people.

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.¹⁹²

Some courts have gone even further. In the cases brought by Iran against the former Shah and his sister, for example, the lower courts concluded that no alternative forum existed because of the political situation in Iran.¹⁹³ Nevertheless—although the

191. See *id.* at 1088–89 (“Although foreign plaintiffs desire—and expect—to be able to sue U.S. defendants in U.S. courts, the courts themselves are increasingly resisting such suits and limiting foreign plaintiffs’ access to the federal courts.”).

192. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff’d*, 809 F.2d 195 (2d Cir. 1987).

193. See *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 248 (N.Y. 1984) (“[T]he trial court and the Appellate Division considered all of the relevant

doctrine of *forum non conveniens* has generally been interpreted to require the availability of an adequate alternative forum as a condition of dismissal¹⁹⁴—the courts concluded that dismissal was appropriate.¹⁹⁵ Their analysis on this point reflects a decided unwillingness to have local resources drained by the very government whose courts had been deemed inadequate:

For almost any other plaintiff, [the unavailability of an alternative forum] would be a sound and fair reason for bringing a suit outside Iran. But this plaintiff is the Islamic Republic of Iran—the Government of Iran. It is a fundamental obligation of every civilized government to provide a system of impartial courts which can fairly adjudicate disputes involving its citizens. As plaintiff is the Government of Iran, that is plaintiff's own obligation. And if this plaintiff has failed in that fundamental obligation, we do not see why the citizens, taxpayers and courts of this state should be subjected to the enormous burden of this lawsuit at the behest of the government which has failed to meet this fundamental obligation.¹⁹⁶

If the individual claimants whose interests are represented in such litigation cannot in fact obtain relief elsewhere, then the decision not to provide this form of judicial assistance may, in some circumstances, have broader implications for global governance. As some scholars argue, the result in cases against corporate defendants may simply be to shield businesses from

factors, including the fact that there may be no alternative forum in which this claim can be tried because of the political situation in Iran under the Khomeini regime.”).

194. See *id.* at 253 (Meyer, J., dissenting) (arguing that the conclusion of the majority is inconsistent with the prevailing view that “an alternative forum is not merely a factor in analysis, but rather *an essential prerequisite* to application of *forum non conveniens*” (quotation omitted)).

195. See *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487, 488 (N.Y. App. Div. 1983) (affirming the lower court's decision, which granted the defendant's motion to dismiss the complaint on the ground of *forum non conveniens*).

196. *Id.* at 490; see also Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 786–87 (2002) (characterizing such cases as arising “due to the [plaintiff] government's own failure to address through legislation the problem it now seeks to address by litigation” in which the plaintiffs seek “to escape deficiencies of [their] own regulatory and remedial systems by using American substantive and procedural standards”).

liability for the harm their operations cause in foreign countries.¹⁹⁷

* * *

The final Part of this Article turns to one particular issue: the extraterritorial application of U.S. regulatory law. It examines the way in which the traditional paradigm has shaped recent developments in that area and uses the insights outlined above to challenge this direction.

IV. “Judicial Imperialism” and the Problem of Extraterritoriality

By accepting jurisdiction over foreign suits that can be appropriately handled locally, the federal courts embroil the nation in a kind of judicial “imperialism” that suggests the United States does not respect or recognize a foreign government’s ability to administer justice.¹⁹⁸

What the majority has unintentionally accomplished in embracing this case is nothing less than the wholesale creation of a World Court, an international tribunal with breathtaking and limitless jurisdiction to entertain the World’s failures, no matter where they happen, when they happen, to whom they happen, the identity of the wrongdoer, and the sovereignty of one of the parties.¹⁹⁹

A. The Emergence of Concerns Regarding Imperialism

The exercise of jurisdiction—whether judicial, legislative, or enforcement²⁰⁰—constitutes an assertion of sovereignty. Therefore, the adjudication of a case with cross-border elements by a court in one state necessarily creates potential conflicts of authority between that state and other affected states (for

197. See, e.g., Dante Figueroa, *Are There Ways out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, 1 BUS. L. BRIEF (AM. U.) 42, 42 (2005) (setting forth this argument).

198. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1239–40 (9th Cir. 2007).

199. *Alperin v. Vatican Bank*, 410 F.3d 532, 568–69 (9th Cir. 2005) (Trott, J., dissenting in part).

200. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987) (classifying jurisdiction into these categories).

instance, the defendant's home state, or the state in which relevant conduct occurred).²⁰¹ That potential is particularly great when the claims in question call for the court to apply local regulatory law to transactions or conduct occurring in other countries, in which case the conflicts may involve not only procedural differences but also differences in applicable substantive norms.²⁰²

For these reasons, the adjudication of claims arising out of cross-border economic activity has long raised concerns regarding interference with sovereign authority. In the area of antitrust regulation, for instance, a series of disputes in the mid-1970s, at a time when corporations were expanding their international operations, highlighted the difficulties resulting from overlapping jurisdiction among multiple countries.²⁰³ However, those concerns were raised in the context of economic activity that touched the forum state along with other countries.²⁰⁴ In that context, the question was whether the nexus of the case with the forum state—and the forum state's interest in regulating the relevant activity—were strong enough, in light of the competing interests of other countries, to justify the assertion of jurisdiction.²⁰⁵ Growing concern about the potential for infringing on the sovereignty of other states was simply a result of the increase in cross-border litigation accompanying globalization.

These concerns were always most salient in the U.S. context because the particular mix of substantive and procedural law in the United States facilitated cross-border regulatory litigation.

201. For example, ordering a foreign defendant to procure documentary evidence located within a foreign country may be viewed as an infringement of that country's sovereignty.

202. See generally Buxbaum, *supra* note 181, at 270 (discussing this distinction).

203. See LOWENFELD, *supra* note 7, at 157–66 (describing the difficulty for U.S. plaintiffs of obtaining discovery against foreign uranium cartel defendants through British courts).

204. *Id.* at 158.

205. *Id.* at 159. The *Restatement (Third) of Foreign Relations Law* addressed this problem by introducing the “jurisdictional rule of reason” as a way to resolve overlaps of regulatory authority. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 403 (AM. LAW. INST. 1987) (determining jurisdiction to be unreasonable if unsupported after consideration of eight enumerated, but non-exhaustive, factors).

While other countries also applied their own regulatory laws to foreign conduct,²⁰⁶ they did not adopt procedural mechanisms—such as the class action or broad discovery rules²⁰⁷—that would make their courts particularly attractive to plaintiffs. As a result, most transnational regulatory litigation remained based in the United States.²⁰⁸ More critically, U.S. courts began to adjudicate claims under antitrust and securities regulations with extremely attenuated connections to the United States. In a number of these cases, federal courts applied domestic regulatory law to the claims of foreign plaintiffs, against foreign defendants, for harms suffered as a result of transactions taking place in foreign countries.²⁰⁹ Although some quantum of conduct in these cases may have occurred within U.S. borders, the U.S. interest in adjudicating such claims was widely considered insufficient to justify the interference with foreign regulatory prerogatives.²¹⁰ These cases therefore opened U.S. courts to the charge of acting

206. See, e.g., Eleanor M. Fox, *International Antitrust and the DOHA Dome*, 43 VA. J. INT'L L. 911, 916 (2003) (discussing the adoption of the effects basis for jurisdiction in other countries).

207. See FED. R. CIV. P. 23 (governing class action suits in U.S. federal courts); FED. R. CIV. P. 26–37 (governing discovery in U.S. federal courts).

208. See Baker, *supra* note 180, at 46 (characterizing the U.S. legal system as “more favorable to private plaintiffs” than any other foreign system because of the potential for punitive damages, mandatory jury trials, opt-out class action suits, and absence of loser-pays fees practice).

209. See, e.g., *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 396 (2d Cir. 2002) (applying U.S. antitrust law to the claims of foreign purchasers in foreign transactions); *In re Vivendi Universal, S.A. Secs. Litig.*, 242 F.R.D. 76, 95–105 (S.D.N.Y. 2007) (applying U.S. securities law to the claims of certain foreign investors for harm resulting from foreign transactions).

210. See, e.g., Brief for the Governments of the Federal Republic of Germany & Belgium as Amici Curiae Supporting Petitioners at 10, *F. Hoffmann–La Roche Ltd v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724) (arguing that applying U.S. antitrust law to the purchase of vitamins in foreign commerce by foreign plaintiffs interfered with sovereign interests and “failed to give proper consideration to the legitimate choices those nations have made concerning the regulation in their own commerce and competition in their own markets”); see also Makan Delrahim, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Speech at the American Bar Association Section of Antitrust Law Fall Forum: Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications at 8 (Nov. 18, 2003) (“And the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries.”).

as the “global policeman” in regulatory matters,²¹¹ and gave additional force to sovereignty concerns.

Perhaps more importantly, U.S. courts began to adjudicate claims that had *no* connection with the United States, in the form of human rights litigation initiated under the Alien Tort Statute (ATS).²¹² By definition, only foreign plaintiffs may avail themselves of jurisdiction under the ATS, and the first wave of human rights litigation involved foreign defendants who had acted outside the United States.²¹³ The second wave, against corporate defendants, sometimes involved U.S. corporations; even in these cases, however, the locus of the relevant conduct was overseas.²¹⁴ Although proponents of ATS litigation supported the involvement of U.S. courts as a way to improve the enforcement of international criminal and human rights norms,²¹⁵ the mere fact that domestic courts were adjudicating events with no real connection to their country generated significant criticism at home and abroad. Critics pointed to the need to safeguard “the international legal order’s indispensable functions of facilitating accommodation and precluding the strong from imposing what

211. See John C. Coffee, *Securities Policeman to the World? The Cost of Global Class Actions*, N.Y. L.J., Sept. 18, 2008, at 5 (“While the press and others attribute the growing disenchantment of foreign issuers with the U.S. market to Sarbanes–Oxley Act, closer analysis and interview data suggests that fear of U.S. private antifraud litigation may be the better explanation [for the exit of foreign companies from U.S. markets].”).

212. See 28 U.S.C. § 1350 (2012) (providing that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

213. See Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1048–53 (2015) (discussing the paradigmatic cases under the ATS, involving acts of torture by foreign government officials against their own citizens).

214. See, e.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 14–16 (D.C. Cir. 2011) (presenting a claim against a U.S. corporation for human rights abuses occurring in Indonesia); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 (11th Cir. 2009) (addressing a claim against a U.S. corporation arising out of conduct occurring in Colombia).

215. See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 35–39 (2002) (describing this litigation strategy); Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2308 (2004) (advocating for the role of U.S. courts in enforcing human rights norms, ensuring accountability for abuses, and providing redress for victims).

they unilaterally perceive as justice.”²¹⁶ It is in this context that the critique of judicial interference with foreign sovereignty gained particular strength, and was frequently framed as a matter of judicial imperialism.²¹⁷

The argument regarding imperialism is simply stated. It contends that the U.S. has no right—indeed, that no country has the right—to impose its legal system, or its legal sensibilities, on any other nation without its consent. Imperialism is commonly defined, after all, as the domination by one nation of another against the will of the latter, forcing

216. Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT’L L. 231, 237 (2010); see also Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT’L L. 111, 125–41 (2003) (analyzing legitimacy concerns raised when individual nations rely on universal jurisdiction to act on behalf of the international community in prosecuting war criminals).

217. See José A. Cabranes, *Withholding Judgment: Why U.S. Courts Shouldn’t Make Foreign Policy*, 94 FOREIGN AFF. 125, 126 (2015) (stating that “the ATS contributed to a perception of American judicial imperialism”); Schrage, *supra* note 198, at 154:

A court decision to hear an Alien Tort Statute claim over actions in South Africa reflects the worst sort of “judicial imperialism.” It would send the message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South Africa’s national reconciliation.

Beth Van Schaack, *supra* note 215, at 2346 (describing the possibility of resistance to ATS litigation as “a form of judicial imperialism or neocolonialism”); Herbert R. Reginbogin, *Litigating Genocide of the Past*, 32 LOY. L.A. INT’L & COMP. L. REV. 83, 88 (2010) (asserting that the defendant states and their publics in Holocaust-era litigation “resented the idea that U.S. courts could call others to account for their role during World War II in the form of a *lex Americana* or even judicial imperialism by using political and economic power to exercise its influence”); Laura Richardson Brownlee, Note, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles “Chuckie” Taylor Jr.*, 9 WASH. U. GLOBAL STUD. L. REV. 331, 349 (2010) (“The breach of state sovereignty represented by the use of extraterritorial jurisdiction can also give rise to claims of judicial imperialism.”). For a similar argument in the area of environmental protection, see Seth A. Northrop, *Exporting Environmental Justice by Importing Claimants: The Suitability and Feasibility of the Globalization of Mass Tort Class Actions*, 18 GEO. INT’L ENVTL. L. REV. 779, 783 (2006) (“Perhaps the most notable objection to an expanded extraterritorial reach of Rule 23 [in environmental cases] is that such an expansion may amount to judicial imperialism.”).

it to subordinate itself to the dominant power's economic, cultural, and/or political values.²¹⁸

B. The Ascendance of the Imperialism Narrative

The narrative in which U.S. courts interfere with the authority of foreign sovereigns has been used by many constituencies involved in transnational litigation. It provides a useful tool for litigants, who deploy that narrative to frame their objections to U.S. jurisdiction of various kinds.²¹⁹ It gives the media a backdrop against which to describe forms of cross-border litigation.²²⁰ Industry groups promoting the

218. Steven M. Schneebaum, *What Is This Case Doing Here? Human Rights Litigation in the Courts of the United States*, 44 CASE W. RES. J. INT'L L. 183, 189 (2011).

219. See, e.g., Novartis AG's Reply Memorandum of Law in Further Support of its Motion to Dismiss at 13, *In re Alcon Shareholder Litig.*, 719 F. Supp. 2d 263 (S.D.N.Y. 2010) (No 10-cv-139)

Tellingly, plaintiffs have cited *no* authority remotely supporting the proposition that . . . a dispute about the meaning of [a foreign corporation's internal] governance documents is transformed into a claim arising under U.S. law. Indeed, if that were the case, any American shareholder of a foreign corporation filing 20-Fs could force the application of U.S. law to matters of internal corporate governance—a result that would deprive the internal affairs doctrine of all force. . . . This would also risk the very type of “legal imperialism” the U.S. Supreme Court has warned against in other contexts.

See also Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' § 14 Claim at 25, *E.ON AG v. Acciona, S.A.*, 468 F. Supp. 2d 559 (S.D.N.Y. 2007) (No. 060-civ-8720)

This is precisely the type of case in which the U.S. interest in a domestic forum carries little weight. The dispute is entirely European. Spain and Europe “have their own sophisticated regulatory structure for takeovers,” and U.S. adjudication of the dispute would effectively strip Spanish regulators of authority over a local transaction, in violation of principles of international comity.

Coffee Decl. ¶¶ 4–5, 32 (noting “European resentment at U.S. ‘legal imperialism’—the seeming insistence by the U.S. that its rules should take priority and control, even when its association with a predominantly foreign transaction is only peripheral”).

220. See, e.g., *Editorial: Old Law, New Questions*, WASH. POST, July 20, 2004, at A16 (noting a “flood of litigation . . . over conduct that, however horrible, is not obviously the province of America's courts to redress”); *Human Rights in Court*, WASH. POST, Apr. 6, 2004, at A21 (describing a “raft of litigation

interests of corporate defendants also situate their arguments within this paradigm.²²¹

In addition, the scholarship on transnational litigation frequently expresses concerns regarding foreign sovereignty—and, increasingly, imperialism. Importantly, the narrative appeals to commentators across the ideological spectrum. Scholars including Professor Mattei and Professor Krisch, for example, refer to the concept of imperialism to express concerns about the hegemonic motives or effects of imposing particular norms through domestic action.²²² In this sense, the narrative is used to challenge the legitimacy of various efforts either to create supranational adjudication mechanisms or to deploy national tribunals in the service of global regulatory goals.²²³ Others, by contrast, invoke concerns regarding infringement on foreign

over wrongs [that] America's courts have no practical power to address”).

221. See generally GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* 45–48 (2003) (using the label “judicial imperialism” to describe the effect of Alien Tort Statute litigation on corporate interests); see also Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 *NW. J. INT'L L. & BUS.* 475, 510–11 (2013) (describing the mobilization of business interests, like those represented by the U.S. Chamber of Commerce, against ATS litigation); Francisco Rivera, *A Response to the Corporate Campaign Against the Alien Tort Claims Act*, 14 *IND. INT'L & COMP. L. REV.* 251, 255–59 (2003) (identifying various groups coalescing around criticism of the Alien Tort Statute as an overextension of U.S. jurisdiction).

222. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUR. J. INT'L L.* 369, 400–04 (2005) (discussing extraterritorial jurisdiction within the larger context of domestic law as “an instrument of international dominance”); Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 *HASTINGS INT'L & COMP. L. REV.* 381, 382–83 (2001) (suggesting that “the expansionist thrust of the jurisdiction of U.S. courts over [claims arising out of the Holocaust] may be viewed as a sort of legal imperialism in which the United States . . . asserts itself upon the rest of the world”).

223. For this critique in the context of transjudicialism, see, for example, Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age*, 31 *MICH. J. INT'L L.* 307, 381 (2010) (critiquing the account of transjudicialism as promoting more effective tribunals for the enforcement of human rights, noting “Third World concerns about a resurgence of neo-colonialist and imperial motives in transjudicialism”); see also Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 *FORDHAM INT'L L.J.* 343, 354 (2008) (discussing the view that international criminal tribunals are “agents and symptoms of imperialism, and [represent] attempts by the West to reestablish its sovereignty over Africa”).

sovereignty to argue for constraints on the activity of the U.S. judiciary as a constitutional matter. Professor Bradley, for instance, has argued that “judicial activism” in extraterritoriality cases can exceed the constitutional authority of the courts.²²⁴ Similarly, Professor Stephan refers to the “resistance of foreign states to the ambitions of U.S. civil litigation”²²⁵ in arguing that “expressive internationalism” as practiced by courts has different, and more deleterious, consequences than the same approach as practiced by the political branches.²²⁶ At the outer edge of this argument, the narrative resonates with those who use the idea of judicial imperialism to attack perceived excesses of judicial power more generally.²²⁷ Perhaps the most visible recent example of this context is the debate following the Supreme Court’s decision in *Boumediene v. Bush*,²²⁸ which many commentators analyzed as an act of imperialism in an ongoing power struggle between the judiciary and the executive.²²⁹

224. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 550–51 (1997) (arguing that separation of powers concerns support the presumption against extraterritoriality); see also Schrage, *supra* note 198, at 154 (describing court rulings in cases challenging global business practices as “judicial intervention [that] threatens to undermine the authority of the President to set U.S. foreign policy with the advice and consent of Congress”); Woolhandler, *supra* note 196, at 781–85 (arguing against extending the “public law litigation model” to the international sphere).

225. Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 655 (2002).

226. See *id.* at 660–61 (concluding that the arguments against “expressive internationalism” do not apply to the political branches).

227. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 544 (1997) (“The history of judicial review in this country, told in broad brush strokes, is one of creeping judicial imperialism.”); ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 2, 22–38 (2003) (bemoaning the “recent ascendancy almost everywhere of activist, ambitious, and imperialistic judiciaries,” and using human rights litigation as an example of that trend).

228. 553 U.S. 723 (2008).

229. See Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 378 (2009) (arguing that the Court’s “forceful view of judicial power” in *Boumediene* straddles the fence between a balanced separation of powers and “an exercise in judicial imperialism”); John Yoo, *The Supreme Court Goes to War*, WALL STREET J. (June 17, 2008, 12:01 AM), <http://www.wsj.com/articles/SB121366596327979497> (last visited Jan. 21, 2016) (characterizing the Supreme Court’s decision in *Boumediene v. Bush* as “judicial imperialism of the highest order,” and stating that “[t]he *Boumediene*

The narrative is of course most compelling when foreign sovereigns themselves use it—and they have done so frequently. In ATS cases, many governments file amicus briefs raising sovereignty concerns.²³⁰ In *Kiobel*, for instance, the Netherlands and the United Kingdom submitted a brief criticizing “the efforts of U.S. litigators and judges to bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties where there is no significant nexus to the United States.”²³¹ Foreign governments have also expressed imperialism concerns in diplomatic and other interventions connected with such litigation. In a case arising out of the apartheid-era activities of corporations active in South Africa, for example, the South African government intervened to argue that litigation in the United States would interfere with its own efforts to address the consequences of apartheid.²³²

It is not only the human rights cases that are framed in this way, however. Foreign governments also invoke these concerns in litigation addressing the geographic reach of various regulatory laws.²³³ In a recent securities fraud case, for example, the United

majority . . . assumes that we have accepted judicial control over virtually every important policy in our society, from abortion and affirmative action to religion”) (on file with the Washington and Lee Law Review); Jules Lobel, *The Supreme Court and Enemy Combatants*, 54 WAYNE L. REV. 1131, 1134–38 (2008) (discussing “judicial supremacy theory” in the context of separation of powers).

230. See, e.g., Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Neither Party at 24, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); see also *infra* notes 231–244 and accompanying text (reviewing the arguments of various foreign sovereigns’ briefs).

231. Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Neither Party at 24, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); see also Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016) (studying amicus briefs filed by foreign sovereigns in the Supreme Court). It is important to note that there are some counter-examples. In *Kiobel*, for instance, the Republic of Argentina filed an amicus brief arguing in favor of U.S. jurisdiction. Brief for the Government of the Argentine Republic as Amici Curiae in Support of Petitioners at 3–4, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (arguing for universal jurisdiction under the ATS over the limited categories of norms recognized in *Filartiga* and *Sosa*).

232. See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 258–59 (2d Cir. 2007) (describing the ex parte declaration of interference by the South African government).

233. See Baker, *supra* note 180, at 46 (“[F]oreign governments have filed

Kingdom filed an amicus brief referencing imperialism concerns in arguing against the extraterritorial application of U.S. law.²³⁴ As a result, the narrative is now used to describe the engagement of U.S. courts not only in cases lacking a meaningful nexus with the United States, but also in cases involving various forms of corporate activity that implicate both local and foreign regulatory interests.

Most consequentially, the imperialism narrative has come to anchor the judicial response in transnational cases.²³⁵ Again, these cases range from human rights litigation to claims arising out of ordinary economic activity. In one ATS case before the U.S. Court of Appeals for the Second Circuit, for example, the concurring opinion stated:

I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them—or be tantamount to “judicial imperialism?”²³⁶

Similarly, a number of antitrust cases, including recent litigation in the Southern District of New York involving alleged rate-fixing in the foreign exchange market, refer to legal imperialism in considering the scope of U.S. antitrust law.²³⁷

numerous amicus briefs over the years, urging the U.S. appellate courts to curb what they regard as ‘judicial imperialism’ by U.S. courts in private civil cases under other federal statutes.”).

234. Brief for the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Defendants–Appellees and Affirmance at 18, *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014) (No. 12-4355) (quoting from Justice Breyer’s opinion in *Hoffmann–LaRoche* criticizing the extraterritorial application of U.S. antitrust law).

235. See Baker, *supra* note 180, at 46 (noting that the arguments raised by foreign governments have influenced the Supreme Court’s jurisprudence).

236. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of rehearing), *denial of rehearing aff’d en banc*, 642 F.3d 379 (2d Cir. 2011); see also *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1239–40 (9th Cir. 2007) (arguing for local exhaustion prior to accepting jurisdiction over foreign suits).

237. See *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 599 (S.D.N.Y. 2015) (finding that under “principles of comity” claims for conduct outside of the United States fall outside the scope of the Sherman Act).

The danger is that this narrative can function as a heuristic that courts use to minimize the complexities inherent in transnational litigation. Viewing cross-border cases through this lens, courts may fail to account sufficiently for U.S. interests that are present even in cases closely tied to other countries. As a result, they may turn too readily to doctrines such as *forum non conveniens*²³⁸ and the presumption against extraterritoriality in order to dismiss transnational claims.²³⁹

Recent Supreme Court jurisprudence in the area of legislative jurisdiction, explored in the following section, reflects such an effect.

C. The Supreme Court on Legislative Jurisdiction

In a series of cases over the past decade, the Supreme Court has addressed the geographic scope of various U.S. laws. The immediate question such cases present is not whether the courts have the authority to adjudicate transnational disputes: it is whether Congress, when enacting a particular statute, intended it to apply to conduct or persons outside of the United States.²⁴⁰ In each of these cases, however, the Court considered the scope of the relevant statute in the context of private litigation. The particular conflicts created by judicial engagement in cross-border regulation were therefore central to the Court's analysis.

F. Hoffmann-La Roche Ltd. v. Empagran S.A.,²⁴¹ decided in 2004, addressed the application of U.S. antitrust law to claims brought by foreign plaintiffs who had purchased price-fixed goods

238. See generally Richard D. Bernstein, James C. Dugan & Lindsay M. Addison, *Closing Time: You Don't Have to Go Home, but You Can't Stay Here*, 67 BUS. LAW. 957, 957–76 (2012) (analyzing the growing tendency of U.S. courts to reject claims involving foreign plaintiffs or foreign conduct, including on the basis of *forum non conveniens*).

239. See Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1085 (2015) (describing this tendency to dismiss transnational claims as “litigation isolationism”).

240. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 401 (AM. LAW INST. 1987) (distinguishing legislative and judicial jurisdiction).

241. 542 U.S. 155 (2004).

in foreign transactions.²⁴² The Court considered the problem of legislative conflict in general, noting that the application of U.S. law in a cross-border setting “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”²⁴³ It specifically noted foreign hostility to the treble damages remedy available in private actions, citing amicus briefs filed by Canada, Germany, and Japan.²⁴⁴ Those briefs had emphasized the “especially intrusive” effect on foreign interests of private enforcement mechanisms²⁴⁵ and the risk that “United States courts [would become] the forum of choice without regard to whose laws are applied, where the injuries occurred, or even if there is any connection to the court except the ability to get in personam jurisdiction over the defendants.”²⁴⁶ The Court held that the Sherman Act did not apply to claims arising out of foreign transactions, to the extent those transactions gave rise only to foreign harm.²⁴⁷

A later decision, *Morrison v. National Australia Bank Ltd.*,²⁴⁸ addressed the same question in the context of securities

242. See *id.* at 159 (summarizing the complaint of plaintiffs alleging a conspiracy among vitamin manufacturers and distributors that resulted in higher priced vitamins in the United States as well as foreign countries).

243. *Id.* at 165.

244. See *id.* at 167–68 (“And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.”).

245. See, e.g., Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 15, *Hoffmann–La Roche*, 542 U.S. 155 (No. 03-724) (arguing that the claims of private plaintiffs were especially intrusive, particularly as compared to actions brought by the U.S. government, which amici characterized as restrained and “sensitiv[e] to the concerns of foreign governments”).

246. Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners at 13, *Hoffmann–La Roche*, 542 U.S. 155 (No. 03-724). These objections were prominent during oral argument as well, where the discussion turned to whether U.S. courts were “world courts,” equipped to entertain the private claims of foreign plaintiffs. Transcript of Oral Argument at 15, *Hoffmann–La Roche*, 542 U.S. 155 (No. 03-724).

247. See *F. Hoffmann–La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 162 (2004) (finding that when adverse foreign effect is independent of adverse domestic effect, as in the case at bar, U.S. antitrust law does not apply).

248. 561 U.S. 247 (2010).

regulation. *Morrison* involved a so-called “foreign cubed” claim: A foreign investor sued a foreign issuer for harm suffered in connection with a foreign investment transaction.²⁴⁹ Some of the defendant’s conduct had occurred within the United States, presenting the question whether that conduct was sufficient to trigger the application of U.S. anti-fraud provisions.²⁵⁰ Again, the Court emphasized the particular context of judicial enforcement.²⁵¹ At oral argument, several justices mentioned concerns regarding the role of U.S. courts. In one exchange with the plaintiffs’ counsel, for example, Justice Scalia stated:

[B]ut Australia says: Look, it’s up to us to decide whether there has been a misrepresentation, . . . and whether it’s been relied upon . . . And we should be able to decide that and we don’t want it decided by a foreign court. . . . [I]t ought to be up to us to decide that issue; and here you are dragging the American courts into it.²⁵²

These concerns were echoed in a number of amicus filings from foreign governments (as well as foreign business groups) protesting the involvement of U.S. courts.²⁵³ The Court ultimately concluded that § 10(b) of the Securities Exchange Act applied only to claims arising out of transactions occurring within the United States, and not to those arising out of foreign transactions.²⁵⁴ In so holding, it referenced the “fear that [the

249. *Id.* at 250–51.

250. *Id.* at 266.

251. *Id.* at 260.

252. Transcript of Oral Argument at 16, *Morrison*, 561 U.S. 247 (No. 08–1191); see also *id.* at 42 (stating argument by the defendant’s counsel that to apply U.S. law “would amount to exactly the soft [sic] of legal imperialism that this Court rejected, rightly, in *Empagran*”).

253. See Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees at 4, *Morrison*, 561 U.S. 247 (No. 08–1191) (“The present case is one of many in which foreign plaintiffs seek to bring essentially foreign disputes before U.S. courts in order to be able to utilize procedures and rules that tend to favor plaintiffs.”).

254. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 273 (2010). This holding restricts the scope of § 10(b) not only in the judicial context but in the public enforcement context as well—a result that Congress reversed in subsequent legislation. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 77v (2012)) (restoring the authority of public regulators to apply Section 10(b) extraterritorially in Section 929P(b)). In this context, then, concerns over judicial overreaching affected perceptions regarding the role of U.S. law in

United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”²⁵⁵

Most recently, in *Kiobel v. Royal Dutch Petroleum Co.*,²⁵⁶ the Court addressed the extraterritorial reach of the Alien Tort Statute. Although that statute is not conduct-regulating but merely jurisdictional, the Court decided that the concerns animating the presumption against extraterritoriality were present in that context as well.²⁵⁷ It noted that foreign policy considerations might in fact be more significant with respect to ATS claims than in other substantive contexts, because “the question is not what Congress had done but instead what courts may do.”²⁵⁸ In this case too, many amicus briefs filed with the Court emphasized the principle of non-interference with the right to self-governance of other sovereigns. The Court held that there was no clear indication that Congress had intended to create jurisdiction over claims based on conduct occurring in the territory of other countries, thereby foreclosing claims that did not “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritoriality.”²⁵⁹

D. Critique

One of the central assumptions of the imperialism narrative is that the application of U.S. regulatory law to foreign conduct—particularly in the context of private enforcement, with all of its related incidents such as treble damages—interferes with foreign sovereignty. Foreign governments themselves have often made such arguments as amicus curiae in litigation involving their

transnational regulation more broadly.

255. *Morrison*, 561 U.S. at 270.

256. 133 S. Ct. 1659 (2013).

257. *See id.* at 1664 (“It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad.”).

258. *Id.*

259. *Id.* at 1669.

citizens.²⁶⁰ They have frequently argued that international law precludes U.S. courts from applying domestic regulatory law to cases with significant foreign elements, as doing so would violate the sovereignty of other affected states.²⁶¹

At one level, the case studies discussed in Part III may be read simply to undermine the strength of these objections. And, indeed, some elements of the complaints filed by foreign governments are difficult to square with the rather categorical assertions they have sometimes made in amicus filings. Many European countries, for instance, have in amicus briefs emphasized the incompatibility of U.S.-style private enforcement procedures with the values of their own justice systems.²⁶² In the tobacco litigation initiated by the European Community, however, they seek treble damages²⁶³—one of the most frequently criticized incidents of U.S.-style private enforcement.

More fundamentally, the analysis of litigation initiated by foreign governments in the United States demonstrates that the concept of “judicial imperialism” fails to capture the ways in which the extraterritorial application of U.S. law may fit comfortably with global governance strategies. In some of the

260. In *Empagran*, for example, Belgium and Germany jointly filed an amicus brief in which they made this point. See Brief for the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 10, *F. Hoffmann–La Roche Ltd v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724)

The most important factors—primacy over a given transaction, the locus of the conduct, the locus of that conduct’s effects, and the strength of the foreign state’s policies that bear on the problem—all point to countries *other than* the United States as the proper forum for these disputes.

261. See Baker, *supra* note 180, at 50–51 (using the U.K.–Netherlands amicus brief in *Kiobel* to outline the “longstanding story of foreign government dissatisfaction with private U.S. litigation brought against foreign nationals for offshore conduct”).

262. See, e.g., Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants–Appellees at 14–15, *Empagran v. F. Hoffmann–La Roche Ltd.*, 417 F.3d 1267 (2005) (No. 01-7115) (arguing that expansive application of U.S. antitrust law would override “deliberate policy decisions [of countries including Germany, The Netherlands, and Switzerland] . . . not to adopt a liberal, jury-based private treble damages system”).

263. *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175, 178 (2d Cir. 2005), *cert. granted*, 136 S. Ct. 28 (2015).

cases described above, a foreign government—by filing a claim—has explicitly consented to the application of U.S. regulatory law to conduct occurring within its own borders. I do not wish here to understate the importance of that consent.²⁶⁴ It is undoubtedly true that a government that has adopted a comprehensive antitrust law, and which enforces that law, might view it as an intrusion on its sovereignty if a foreign court were to apply its own (and different) law to claims against that government's citizens based on harms felt within its borders.²⁶⁵ Yet that same government might welcome the application of foreign law—even to claims against its own citizens, based on harms felt within its borders—in order to recover for losses caused by a criminal enterprise.²⁶⁶ But these claims—and, most importantly, their characterization of the relationship between the private enforcement of domestic regulatory law and other modes of governance—indicate the possibility of a meaningful role for domestic courts and domestic law in a cooperative regulatory system. The imperialism narrative underplays that possibility.

Finally, the cases also suggest that the very concept of “sovereignty,” as it relates to mechanisms of global governance, may have a different valence in different parts of the world. General statements that the application of domestic regulatory law in transnational cases violates the sovereignty of affected states may fail to capture accurately the interests of developing countries.²⁶⁷ The resource arguments those countries make

264. It is not the extraterritorial application of law per se that triggers sovereignty concerns, or the involvement of a U.S. court in litigation that is closely connected with another country. It is the extraterritorial application of law against the will of the foreign sovereign. See Schneebaum, *supra* note 218, at 189 (defining imperialism as “domination by one nation of another against the will of the latter”).

265. See Brief of the Government of Canada as Amici Curiae Supporting Reversal at 10–15, *F. Hoffmann–La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724) (arguing that Canada and other nations have a substantial interest in regulating anticompetitive behavior and that upholding U.S. jurisdiction would conflict with and impede effective administration of Canada's antitrust regime).

266. See Brief for Plaintiff–Appellant at 15–18, *Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) (seeking the application of RICO, including in a claim against a Canadian company).

267. In the *Kiobel* litigation before the Supreme Court, for instance, the

directly, as plaintiffs, contradict the generalized assertions made by other countries as amici curiae that comity requires constraints on the application of domestic regulatory law by U.S. courts.²⁶⁸ Moreover, the resource deficiencies discussed in some of these complaints may also speak in favor of more expansive, not more restrictive, application of domestic regulatory law. As I and others have argued, in the case of conduct that affects many countries simultaneously, a lack of adequate regulation in some jurisdictions means that the actors may realize a gain from their conduct, despite paying fines or damages in others.²⁶⁹ If that is true, then such conduct will be insufficiently deterred, creating additional enforcement costs even in the jurisdictions that do have effective regulation.²⁷⁰ All countries affected by such

Republic of Argentina filed an amicus brief stating that the application of the Alien Tort Statute in U.S. court created little risk of undermining the sovereignty of foreign governments. Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners at 14, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491). It concluded,

The Alien Tort Statute offers a valuable instrument to promote goals shared by all democratic republics. Many Alien Tort Statute arising abroad are brought in contexts where no alternative forum exists . . . Loss of the Alien Tort Statute as a tool for human rights victims seeking justice would be a serious blow to the cause of democracy and human rights.

Id.

268. Ralf Michaels has made the point that the U.S. Supreme Court, in particular, may be ignoring a second form of imperialism: Not the kind that comes from “imposing U.S. law on the rest of the world,” but the kind that comes from “rejecting access to the courts necessary for protection against Western corporate actors.” Ralf Michaels, Empagran’s *Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 533, 546 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

269. Hannah L. Buxbaum, *Class Actions, Conflict and the Global Economy*, 21 *IND. J. GLOBAL LEGAL STUD.* 585, 596 (2014); see also Michal S. Gal, *International Antitrust Solutions: Discrete Steps or Causally Linked*, in *MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW* 239, 241–42 (Josef Drexler et al. eds., 2009) (describing global underdeterrence in the area of antitrust law); JOHN M. CONNOR, *EXTRATERRITORIALITY OF THE SHERMAN ACT AND DETERRENCE OF PRIVATE INTERNATIONAL CARTELS* 3–4 (2004), <http://ageconsearch.umn.edu/bitstream/28686/1/sp04-08.pdf> (arguing that jurisdiction in the United States over such cases is necessary to increase global deterrence to an “acceptable level”).

270. For early recognition of this challenge in a case brought by foreign governments, see *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 315 (S.D.N.Y. 1971) (involving an action brought by the State of Kuwait against

activity, in other words, have a domestic interest in ensuring adequate levels of regulation at the global level.

V. Conclusion

Concerns regarding foreign sovereignty occupy a central place in conversations regarding the role of U.S. courts in the transnational arena, and rightly so. Even proponents of expansive judicial participation in global governance, aware of the conflicting and overlapping authority of different states, recognize the need to observe the jurisdictional rules that “allocate among states a competence to take account of the distribution of value, policy, interest, and power existing in the world today.”²⁷¹ In recent years, however, these concerns have come to be situated within a particular normative framework: one within which the activity of domestic courts necessarily interferes with sovereign regulatory authority. This orientation—particularly when it is described as “judicial imperialism”—exerts force in a particular direction: toward constraining the role of domestic courts in addressing transnational disputes.

This Article’s analysis of litigation initiated in U.S. courts by foreign sovereigns challenges the presumptions that shape this framework. By exploring situations in which foreign governments actively seek the engagement of U.S. courts, it provides a

corporate defendants, which alleged price fixing in the sale of broad spectrum antibiotics).

A conspiracy among domestic producers of antibiotic drugs to reduce or eliminate competition as to foreign sales would certainly have an adverse effect on domestic competition. Not only would it enable the domestic manufacturers to build up a substantial “war chest” from excessive profits from foreign sales but such a conspiracy might prevent either a domestic or a foreign manufacturer from entering into the foreign market in order to build up its strength to enter into the restricted domestic market. In an age of expanding world trade, a truly successful monopoly requires control of both domestic and foreign markets. For these reasons, this court is convinced that the fundamental goal of the antitrust laws could be seriously frustrated by not permitting Kuwait to maintain a treble damage action for damages resulting from the alleged conspiracy.

Id. at 316–17.

271. RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 9 (1964).

counterpoint to the prevailing narrative. Further, it argues that the notion of “judicial imperialism” is both inaccurate and unhelpful. First, that construct fails to capture the broader context of interaction between U.S. courts and foreign governments, much of which involves the courts as participants in cooperative governance processes. Second, it elides important regional differences regarding the effectiveness of enforcement in the transnational arena. Third, by placing domestic and foreign interests in opposition to each other, it obscures important shared and global interests in matters of transnational regulation. Finally, it creates a false dichotomy between unilateral and multilateral enforcement efforts in many substantive fields of law. In all of these ways, the imperialism narrative interferes with a fair assessment of the judicial role in global governance.